Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ED BROWN, *et al.*,
Petitioners,

v.

JAMES GILMORE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Virginia Code § 22.1-203 (2000), mandating a "minute of silence" for all of Virginia's public school students to "meditate, pray, or engage in . . . other silent activity," violates the Establishment Clause of the First Amendment, as construed and applied in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

PARTIES TO THE PROCEEDINGS

Petitioners Ed Brown, Rosalynne Brown, Vanessa Brown, Marc Cohen, Amy Cohen, Michael Cohen, Frank Feibelman, Seth Feibelman, Gregory Kruglak, Patricia Kruglak, Kathryn Anya Kruglak, Jeffrey Lepon, Cora Yamamoto, Jana Lepon, Ariel Lepon, Wayne Gray, Deborah Gray, Robyn Gray, Mark Magruder, Ella Magruder, Mia Magruder, Roy Kupersmith, Adriana Kupersmith, and Jordan Kupersmith (collectively "Petitioners") were appellants before the court of appeals and plaintiffs in the district court. Respondents James Gilmore, Wilbert Bryant, Jo Lynne DeMary, the Virginia Board of Education, the Virginia Department of Education, Dr. Daniel A. Domenech, Dr. Mark A. Edwards, Dr. John J. Daniels, Dr. Edgar B. Hatrick III, the Fairfax County School Board, the Henrico County School Board, the Amherst County School Board, and the Loudoun County School Board (collectively "Respondents") were appellees before the court of appeals and defendants in the district court.

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OPINIONS BELOW

The July 24, 2001, opinion of the United States Court of Appeals for the Fourth Circuit, affirming summary judgment for the Respondents and rejecting Petitioners' appeal of the denial of their motion for preliminary injunction is reproduced in the Appendix at 1a-44a and is reported at ___ F.3d ___. The September 5, 2000, order of the Fourth Circuit denying Petitioners' emergency motion for injunction pending appeal is at Pet. App. 50a-52a. The October 26, 2000, opinion of the United States District Court for the Eastern District of Virginia (Alexandria Division) granting summary judgment to Respondents is set forth at Pet. App. 53a-68a. The

August 31, 2000, order of the district court denying Petitioners' motion for preliminary injunction is at Pet. App. 69a.

JURISDICTION

The court of appeals entered its opinion and judgment on July 24, 2001. This Petition is being filed within 90 days after the entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The complete texts of the First and Fourteenth Amendments to the United States Constitution are provided at Pet. App. 70a-71a. The complete text of Virginia Code § 22.1-203 (2000) is set forth at Pet. App. at 72a. The complete text of Virginia House Joint Resolution 71 (2000) is included at Pet. App. 73a-74a.

STATEMENT OF THE CASE

This case concerns the facial validity of Virginia's statewide mandatory "minute of silence" statute, which seeks to facilitate and promote "the free exercise of religion . . . within the schools" by setting aside a specific time during school hours when students may pray together, albeit silently, as part of a classroom exercise. Although the statute permits students to engage in other forms of silent or meditative activity during the daily time period set aside in the classroom, the statute was enacted specifically to facilitate and encourage student prayer at that fixed time. The statute was accompanied by a formal legislative statement lamenting this Court's decisions barring the imposition of vocal prayers in the classroom. As with the Alabama statute at issue in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the law at issue was enacted under circumstances leaving no doubt that with it, the Virginia General Assembly (and when signed into law, the Governor) were placing the Commonwealth's imprimatur on the moral and spiritual virtue of prayer in school.

On January 13, 2000, Virginia Senator Warren Barry proposed Senate Bill No. 209 ("SB 209") to "amend and reenact" Virginia Code § 22.1-203 to require the observance of a mandatory "minute of silence" in which students must "meditate, pray, or engage in . . . other silent activity" together each day, in each public school classroom throughout the Commonwealth of Virginia. Pet. App. 72a. The proposed statute limited the types of prayer and meditation activities in which students might participate during the minute of silence, providing that students might only engage in those prayers, meditations, and other activities which permit them to remain seated and silent and without making "distracting display[s]." *Id.*

The preamble to the minute of silence law specifies that its purpose is to assure that the "free exercise of religion be guaranteed within the schools." *Id.* No other purpose is set forth in the statute. The Virginia General Assembly approved the minute of silence law in the form in which it was introduced.

The new minute of silence law amended Virginia Code § 22.1-203 in two significant respects. First, the prior version of the statute was *permissive*: it allowed individual local school districts to implement a minute of silence exercise at their discretion.[1] The new statute withdrew the discretion of the local school district over such matters, making the minute of silence *mandatory* in every public school throughout the Commonwealth. Pet. App. 72a. Second, because the General Assembly was well aware of this Court's decision in *Wallace*

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[1] Under the prior version of Virginia Code § 22.1-203 (enacted in 1976, nearly a decade before this Court's decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985)), fewer than 20 school divisions elected to implement a minute of silence in their classrooms at any point after 1976. Pet. App. at 5a. No court challenges were brought against the facial validity of the prior, permissive statute and Petitioners are unaware of any reported cases challenging the application of the prior version of the law.

v. Jaffree, 472 U.S. 38 (1985), it anticipated during its debates that the minute of silence law likely would face a challenge to its constitutionality by affected parents and school children. SB 209 therefore added a provision that the Virginia Attorney General would intervene in any such action and provide for legal defense of the law. *Id.*

Certainly aware of this Court's decision in *Wallace v. Jaffree*, invalidating a similarly worded Alabama moment of silence statute (and well aware of the likelihood of a legal challenge to the statute), it is fair to say that the proponents of SB 209 adopted a rhetorical approach to the benefits of the law that lacked some of the fervor of the proponents of the similar Alabama statute. The bill's proponents—and, indeed, the Virginia General Assembly itself—nonetheless went to great lengths to convey to the public (including the Commonwealth's one million public school children, their parents, teachers and school administrators) their support for prayer in the classroom and the role of this statute in promoting classroom prayer. Indeed, the enacted statement of purpose of the statute is to guarantee "the free exercise of religion . . . within the schools." The General Assembly purposefully rejected a proposed amendment to the bill that would have removed the specific reference to prayer as one of two stated silent activities in which students may engage. As one of the bill's co-sponsors publicly stated during the legislative process, without the word "pray" in the new mandatory exercise, the students would "simply [ ] be quiet with no purpose." Pet. App. 7a. After signing SB 209 into law, Governor Gilmore approvingly remarked to the Commonwealth's citizens that the new minute of silence exercise would allow students to "bow their heads and pray." Pet. App. 8a.

On the same day that the Virginia Senate passed the new mandatory minute of silence exercise, it joined with the Virginia House of Delegates in approving House Joint Resolution No. 71 ("HJR 71"), calling for a return of

"individual or group prayer in public schools." Pet. App. 74a. In HJR 71, the Virginia legislature criticized this Court's decision invalidating vocal public school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962), arguing that it "has severely constrained the exercise of religious freedom guaranteed by the First Amendment." Pet. App. 73a. Extolling the virtues of "statements of belief in a Supreme Power" and announcing that "voluntary [school] prayer is a beneficial practice," the General Assembly urged the United States Congress to amend the federal Constitution to allow for organized public school prayer. *Id.* at 73a-74a.

Adversely affected by the now mandatory daily exercise, Petitioners (Virginia public school students and their parents) brought an action in the United States District Court for the Eastern District of Virginia (Alexandria Division) challenging the statute as facially invalid under the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment. Petitioners filed the facial challenge case shortly before the bill became effective on July 1, 2000.

Petitioners sought a preliminary injunction prohibiting implementation of the minute of silence law before the beginning of the 2000-2001 school term. Chief Judge Claude Hilton denied Petitioners' motion for preliminary injunction on August 31, 2000. Pet. App. 69a. Petitioners appealed that decision and also sought an emergency injunction pending appeal from the United States Court of Appeals for the Fourth Circuit. A divided panel of the court of appeals denied the request for an emergency injunction on September 5, 2000. Pet. App. 50a-52a. The district court subsequently entered a decision on the merits on October 26, 2000, denying Petitioners' motion for summary judgment and granting Respondents' cross-motion for summary judgment. Pet. App. 53a-68a. Petitioners timely sought an appeal of the merits decision with the United States Court of Appeals for the Fourth Circuit, which consolidated the merits appeal with the preliminary injunction appeal. On

July 24, 2001, a divided panel of the Fourth Circuit affirmed the merits decision of the district court in a published opinion, also rejecting Petitioners' appeal of the denial of the preliminary injunction. Pet. App. 1a-44a.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ of certiorari because the decision of the court of appeals: (1) is inconsistent with the prior decisions of this Court, particularly *Wallace v. Jaffree*; (2) creates an intolerable conflict in that the equivalent minute of silence law, enacted for the same evident religious purpose, is now permitted in Virginia but not in Alabama; and (3) raises important questions concerning the analysis of legislative "purpose" under the Court's Establishment Clause jurisprudence.

I. THE DECISION OF THE COURT OF APPEALS IS INCONSISTENT WITH THE DECISION OF THIS COURT IN *WALLACE V. JAFFREE.*

Virginia's minute of silence statute was passed for the stated purpose of allowing students to pray together in the public school classroom, albeit silently, at a time fixed by the school and in a manner established by the state legislature. The language of the statute and the contemporaneous actions of the legislature and Governor demonstrate that the Commonwealth was at pains to lend its official imprimatur to the benefits of prayer during the school day. Those two elements—that the statute was passed expressly to *facilitate prayer* in the public schools and that the State had visibly *placed its imprimatur on prayer* in the schools (as opposed to any other silent activity)—were the two central elements of the statute itself and the surrounding circumstances found to be present in *Wallace v. Jaffree*, requiring invalidation of the Alabama statute at issue there.

Those factors are present in this case and likewise require invalidation of this statute. In ruling otherwise, "the majority [of the court of appeals] spurns controlling precedent" of this Court. Pet. App. 26a (King, J., dissenting). Unless "we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982). *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Accordingly, either *Wallace v. Jaffree* remains good law and controls this case or this Court must decide whether to overturn it. But, the court of appeals cannot distinguish it away. The First Amendment cannot "be [so] skirted with a nod and a wink." Pet. App. 34a (King, J., dissenting).

In *Wallace v. Jaffree*, the Court considered the constitutional validity of Alabama Code § 16-1-20.1 (Supp. 1984), which provided for daily observance of a minute of silence "for meditation or voluntary prayer" in each public school classroom, 472 U.S. at 40-41. This Court held that the Alabama statute's express inclusion of prayer in the text of the statute, coupled with extrinsic indicia of a legislative purpose to position prayer as a favored practice, rendered the moment of silence statute unconstitutional under the Establishment Clause of the First Amendment, as applied to the States by the Fourteenth Amendment. *See id.* at 60.

As this Court explained in *Wallace*:

> The legislature enacted § 16-1-20.1 . . . for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a

> favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

Id. The "crucial question is whether [Alabama] has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Id.* at 73 (O'Connor, J., concurring).

As in *Wallace*, there is no escaping that this law was enacted to convey "the message that children should use the moment of silence for prayer" in every one of the Commonwealth's public school classrooms. The stated purpose of the statute is to accommodate the "free exercise of religion" in the schools; no non-religious purpose is set forth in the law. Yet, there is no suggestion that this statute remedied any lack of student freedom to pray silently in Virginia's public schools. As this Court has noted many times, the First Amendment's Free Exercise Clause already protects the right of Virginia's public school children to pray, meditate, or reflect before, during, or after the school day. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); *Wallace*, 472 U.S. at 59, 81-84 (O'Connor, J. concurring). Thus, the statute needlessly "accommodates" something (*i.e.*, a student's individual right to pray) that required no accommodation because it was never restricted, but now does so in a setting and manner established by the legislature. The statute establishes a time when students are encouraged to pray together, at a time set by the school, in an organized way. Given that Virginia's public school students already enjoyed the protection to pray silently during school, "there was no need to 'accommodate' or to exempt individuals from any general governmental requirement because of the dictates of . . . the Free Exercise Clause." *Wallace*, 472 U.S. at 58 n.45. *See also Edwards v. Aguillard*, 482 U.S. 587-88

(1996).[2] The accommodation rationale can no more protect this statute than it could the statute at issue in *Wallace*.

Moreover, this express statutory "accommodation" of religious practice was accompanied by a clear legislative endorsement of classroom prayer as the favored practice. The contemporaneous acts of the legislature, the legislative history of the statute, the nature of the legislation and its plain text, all communicate a very public effort by the Commonwealth to encourage or promote prayer. *See Wallace*, 472 U.S. at 73 (O'Connor, J., concurring).

a. The Commonwealth's religious purpose is underscored by the absence of *any* secular motive articulated within the text of the statute. The preamble of the statute states that the minute of silence is aimed only at guaranteeing "the free exercise of religion . . . within the schools." Pet. App. 72a. There is no mention in that statutory statement of any non-religious pursuits or benefits, including those proffered by the bill's sponsors.[3]

b. With HJR 71, passed contemporaneously with the statute at issue, the General Assembly officially, openly and unambiguously promoted its desire to return prayer to the

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[2] Moreover, the statute contemplates "accommodation" only of those students who wish to pray in the manner endorsed by the Commonwealth—*i.e.*, seated, silently, and without making "distracting displays." The statute does not allow for prayer by those students who, in the exercise of their religion, must—for example—stand, genuflect, kneel, gesture, or pray aloud. The statute is therefore most appropriately viewed not as an accommodation of religion—but as an endorsement of certain religions and discrimination against others.

[3] Senator Barry suggested at times that the minute of silence bill was born out of a sense of frustration over school violence and that the exercise might provide students an opportunity to reflect. Pet. App. 6a. Respondents below also argued that the bill was motivated by a purpose to promote "good order and discipline" and provide an opportunity for introspection. Pet. App. 7a. However, none of the putative purposes mentioned by these individual legislators appears in the statute itself.

State's public school classrooms. Thus, the State unambiguously *endorsed* school prayer and simultaneously *required* a school exercise in which that intent could be manifested. Accordingly, when given the "option" to meditate, pray or engage in other silent activity during the minute of silence, no student could mistake that the Commonwealth prefers and, indeed, has publicly advocated, that the time be used to pray. If *Wallace* means anything, it means that a State cannot pass what pretends to be a facially neutral statute setting aside a silent period, and then, in a separate but no less public way, convey the message that schoolchildren should use that time to pray.

c. The General Assembly rejected a proposed amendment that would have deleted the specific reference to prayer as an intended option. Rather than simply provide a minute of silence, the General Assembly wanted specifically to convey the message that the mandatory minute of silence contemplated that the time be used for prayer. Indeed, one of the bill's co-sponsors publicly stated that, if the General Assembly failed to specifically convey the message that the minute of silence provided for and encouraged prayer, the students would "simply be quiet with no purpose." Pet. App. 7a. The purposeful choice of prayer as a stated option carries weight: If the statute stated that students "may use the time to state the Lord's Prayer or use the time in any other silent activity," one would be hard pressed to deny the impermissible legislative endorsement of the Lord's Prayer by virtue of its specific mention.

Thus, along with the statute's preamble and the contemporaneous resolution, the plain text of the Virginia statute conveys the Commonwealth's desire to favor prayer as a student practice. *See* Pet. App. 39a-40a (King, J., dissenting) ("only two . . . activities—meditating and praying—are expressly endorsed by the Commonwealth"). This Court recognized as much in examining the nearly identical Alabama law in

Wallace. 472 U.S. at 60 (finding that the addition of the words "or voluntary prayer" to a minute of silence statute "indicates that the State intended to characterize prayer as a favored practice"). The Virginia statute was enacted to encourage students throughout the State to pray together during the mandatory exercise. The permission to use the time to engage in other activities during that period does not change that overriding endorsement of prayer as a favored practice.[4]

d. Also telling is the statute's *mandatory* nature, imposing on every local school board, for the first time, an *obligation* to impose the minute of silence every day in every classroom. One would assume that local school boards would ordinarily be free to choose to employ a minute of silence exercise if it found that it would serve a general educational purpose. Here, however, when the legislature stated its desire that there be prayer in the schools (not meditation and not silence), the legislature imposed upon every school board the obligation to implement a minute of silence exercise. Accordingly, the Commonwealth's message—favoring prayer as an option—is broadcast even louder by the mandatory, state-wide nature of the exercise.

e. Further emphasizing the government's endorsement of prayer during the minute of silence, Governor Gilmore

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[4] Where the legislature has lent its imprimatur to prayer, the permission to meditate or engage in other "silent activity," does not dilute the impermissible message or validate the statute. *See Lee v. Weisman*, 505 U.S. 576, 596 (1992) (the presence of "provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers [does] not shield those practices from invalidation."). Indeed, in *Santa Fe*, this Court observed that the alternative formulation of two options ("statement or invocation"), one purportedly religious and one not, was insufficient to establish the required governmental neutrality. 530 U.S. at 306-07. Likewise here, the alternative formulation of "meditation or prayer" does not render the minute of silence statute neutral.

publicly and approvingly stated at the bill's signing that students could now among other things "bow their heads and pray" during the exercise. Pet. App. 8a. Clearly, such public expressions by the Commonwealth's Chief Magistrate reveal the precise purpose of this law—to encourage Virginia's one million public school children to pray during the exercise.

Under these circumstances, as in *Wallace*, "an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." 472 U.S. at 76 (O'Connor, J., concurring). Judge King recognized as much below, noting in his dissent that "any objective observer should [recognize] that the real purpose of the statute is Virginia's endorsement of prayer in the Commonwealth's schools." Pet. App. 30a n.3. (King, J. dissenting). No schoolchild aware of what the legislature had done, or what the Governor had said, could fail to perceive that the Commonwealth was commending prayer to that child as a preferred activity during the exercise.

All that is arguably missing from this record that was present in *Wallace* was the unabashed statement of the Alabama law's primary sponsor, in the legislative record and in later testimony before the district court, that the legislation was solely an "effort to return voluntary prayer" *per se* to the public schools. Yet, it is impossible to believe that the outcome in *Wallace* turned on the individual sponsor's statements. *See Wallace*, 472 U.S. at 77 (O'Connor, J., concurring) (noting that one ought to "give little, if any, weight to this sort of evidence of legislative intent").[5] To the

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[5] The dissent below took a similar approach, recognizing that "[i]t is not necessarily helpful to rely on the comments of individual legislators to ascertain the purpose behind the statute, because some insisted that their intent was purely neutral, while others advanced impermissible motives." Pet. App. 30a n.3. (King, J., dissenting). In contrast, the majority placed great reliance on these statements, accepting them as the only reliable indicia of the legislature's alleged purpose. *Id.* at 6a-8a. Such mistaken reliance by

contrary, this Court has made clear that, in determining legislative purpose, the examination should focus on "[t]he plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history . . . [as well as] the specific sequence of events leading to passage of the statute." *Edwards*, 482 U.S. at 594-95.

Here, "[h]owever deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools." *Wallace*, 472 U.S. at 77 (O'Connor, J., concurring). *See also* Pet. App. 40a. (King, J., dissenting) ("it is inescapable that the Virginia legislature intended to endorse prayer as a favored practice . . .").

The statute in *Wallace* was invalidated, as this one must be here, solely because of its impermissible purpose. Under the Establishment Clause framework set forth by this Court, in order to withstand First Amendment scrutiny, "the statute must have a secular legislative purpose." *Wallace*, 472 U.S. at 55 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Thus, in this case (as in *Wallace*), no one has questioned that a genuinely neutral and secular moment of silence statute can be constitutional. At the same time, *Wallace* makes clear that a moment of silence statute, accompanied by legislative and executive grandstanding favoring the prayer "option"—or by an official resolution endorsing student prayer—cannot and should not survive First Amendment challenge. The communicated purpose of the statute manifests the endorsement of religious practice that is intolerable under the Establishment Clause. Under the test articulated in *Lemon*, 403 U.S. at 612-13, this inquiry into purpose is a matter of prime importance under the Establishment Clause.

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the panel majority runs counter to this Court's approach in *Wallace*, 472 U.S. at 77 (O'Connor, J., concurring).

The reason that the Court has shown such sensitivity to legislative purpose (particularly communicated purpose) is because of the unique values underlying the Establishment Clause and the ease by which the State can manifest its establishment of religion merely by *endorsement* of a religion—without necessarily having to protect that religion by statute. For example, a simple declaration by the legislature that the Commonwealth of Virginia is a Christian Commonwealth would go a long way to establishing a religion, whether or not the State acts upon it by then conveying special benefits to religion generally or to some special sect. That State's *endorsement* in the field of religion carries with it a special coercive force. That public, governmental statement of endorsement—given the historic roots of this country in rejecting established religions—may justifiably cause minority religious groups to fear oppression and ostracism by the machinery of the State.

As this Court has long recognized, where the State conveys a message of religious purpose—manifested in a statute or like policy—it wields an inherent coercive power that impermissibly tends toward the establishment of religion. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962); *see Wallace*, 472 U.S. at 70 (O'Connor, J., concurring); *see also* Pet. App. 26a (King, J., dissenting).

These concerns regarding the coercive power of the majority government are particularly applicable where, as here, the state action is manifested in the public schools. *See also Edwards*, 482 U.S. at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."); *Wallace*, 472 U.S. at 60-61 n.51; *id.* at 81 ("This

Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.") (O'Connor, J., concurring); *Santa Fe*, 530 U.S. at 311-12. There "are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there." *Lee v. Weisman*, 505 U.S. 576, 592 (1992) (citations omitted).

To illustrate, we can assume that a minute of silence statute unaccompanied by any message of religious endorsement likely would be constitutional. We can likewise easily recognize that a legislative resolution stating the legislature's desire that students engage in Christian prayer in the schools would plainly be constitutionally repugnant, but might be held to be beyond the power of the courts to redress; without some implementation of that desire, there might be no standing to challenge that policy. However, when the illegitimate purpose is manifested in a law that might otherwise be characterized as neutral, *Wallace* requires that the statute be held invalid. In that circumstance, those who must abide the statute—who must sit in the classroom during the silent moment—do so with the knowledge that they are experiencing the Government's effort to further religious ends and practices that are not necessarily the student's own. That is at least one reason, though perhaps not the only one, that the Court has not wavered from scrutiny into "purpose" as a central element of the *Lemon* test.

Importantly, both the majority and the dissent below recognized that the minute of silence statute has a religious purpose. *See* Pet. App. 15a-17a (recognizing that one of the statute's purposes was to permit students to pray); *id.* at 30a ("the statute's true aim is clear: to encourage students to pray.").

The difference between the majority and dissent reflects two different starting points. The majority begins by characterizing the statute as an accommodation of religion. *See* Pet. App. 12a-14a (examining "accommodation" cases); *id.* at 20a (concluding that the minute of silence is "a 'permissible accommodation' of religion").

As discussed above, this "accommodation" rationale was expressly rejected in *Wallace*. Indeed, it is difficult to give accommodation substantial weight here for precisely the same reasons as in *Wallace*. Students do not need this statute—setting forth a specific time and place for students to pray together in order to recite a silent prayer in school. As was the case in *Wallace*, "[i]f we assume that the religious activity that [the state] seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by [the minute of silence law] . . . No law prevents a student who is so inclined from praying silently in public schools." *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring). Accordingly, as the dissenting judge below recognized, "the Virginia statute is entirely unnecessary to protect the free exercise of religion in public schools." Pet. App. 36a. (King, J., dissenting).

In contrast, the dissent began with the premise that the purpose of the Establishment Clause is to protect citizens from majoratarian endorsement of religion and religious practice. On that premise, which is the premise underlying this Court's cases, this statute cannot stand.

Because the decision of the court of appeals does not follow the precedents established by this Court, the Petition should be granted. *See Hutto*, 454 U.S. at 375. Thus, this statute must be stricken under the authority of *Wallace v. Jaffree* unless *Wallace v. Jaffree* is overruled—something that can be done only by this Court and not *sub silentio* by a court of appeals.

II. REVIEW SHOULD BE GRANTED TO RESOLVE THE NATIONAL CONFLICT CREATED BY THE COURT OF APPEALS' DECISION IN THIS CASE.

The decision of the Fourth Circuit creates an untenable inequity and conflict: the equivalent minute of silence statute is constitutionally invalid in Alabama but valid in Virginia.

The relevant statute at issue in *Wallace* and the statute at issue here have virtually identical language, were passed in virtually identical circumstances, and have no discernible difference in purpose.[6] Indeed, had the Alabama statute been allowed to stand, the two statutes would have the same

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[6] The Alabama statute invalidated in *Wallace* provided that:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a *period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.*

472 U.S. at 40 n.2 (quoting Alabama Code § 16-1-20.1 (Supp. 1984 (emphasis added). In nearly identical language, Virginia's minute of silence law requires that:

> [T]he school board of each school division *shall establish the daily observance of one minute of silence* in each classroom of the division. During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display *to the end that each pupil may . . . meditate, pray, or engage in any other silent activity . . .*

Pet. App. 72a. Thus, both the Alabama law and the Virginia law were passed to amend existing sections of their respective state codes; both statutes contemplate the daily observance of one minute of silence in each and every public school classroom; both preclude students from engaging in activity other than meditation, prayer, or other silent activity; both provide for prayer as an express option during the moment of silence; and neither allows for school children to opt out of the state-sponsored activity.

impact upon the daily lives of millions of public school children. Yet, the Fourth Circuit has deemed the Virginia minute of silence statute constitutional, while this Court invalidated the Alabama statute. The difference in constitutional results between different states is difficult to justify under our national system, particularly if—as the Fourth Circuit's opinion suggests—that difference is due solely to the rhetorical comments of one Alabama state legislator made in reference to the statute at issue in *Wallace*. Pet. App. 23a (suggesting that, in contrast to *Wallace*, there is no evidence that the Virginia legislature or Senator Barry acted in "open defiance of federal constitutional law" in enacting SB 209). As this Court made clear in *Wallace*, "little, if any, weight [should be given] to this sort of evidence . . . ." 472 U.S. at 77 (O'Connor, J., concurring); *id.* at 65 (Powell, J., concurring). Certainly, the absence of like comments here does not change the language of the statute, its purpose, its nature, or its impact on school children—and therefore it must not control the constitutional inquiry.[7] Certainly, it cannot justify the constitutional anomaly created here.

That anomaly is underscored by the fact that other courts, interpreting *Wallace v. Jaffree*, have struck down other moment of silence statutes. *See May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985); *Walter v. West Virginia Bd. of Educ.*, 610

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[7] While the Alabama act provided that "the teacher in charge of the room in which each class is held ***may*** announce that a period of silence" is to be observed, the Virginia law ***requires*** such action. *See* Virginia Code § 22.1-203 ("the school board of each school division ***shall*** establish the daily observance of one minute of silence in each classroom" and "the teacher responsible for each classroom ***shall*** take care that" the minute of silence is observed). Moreover, the Virginia statute imposes the additional limitation that students must remain seated and silent and refrain from any "distracting display." As such, the Virginia statute is—if anything—more onerous than that declared unconstitutional in *Wallace*. Pet. App. 41a (King, J., dissenting) ("the compulsory nature of the [Virginia] statute plainly renders it even more offensive than the *Wallace* statute . . .").

F. Supp. 1169 (S.D. W.Va. 1985); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982) *vacated and appeal dismissed*, 718 F.2d 1098 (6th Cir. 1983). Indeed, the only cases upholding a moment of silence after *Wallace v. Jaffree* have arisen in circumstances that are plainly distinguishable from what took place in both Alabama and Virginia. *See Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997); *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). Even the Fourth Circuit implicitly recognized as much and thus its opinion does not place significant weight on either *Chaudhuri* or *Brown*. Whether decided rightly or wrongly, those cases provide little guidance here.

The Fourth Circuit did not recognize those cases as providing significant guidance because the Tennessee practice and Georgia statute at issue in *Chaudhuri* and *Bown*, respectively, were quite *unlike* those at issue in *Wallace* and here.

> a. In *Chaudhuri*, the Sixth Circuit was faced with a challenge to Tennessee State University's practice of including a generic moment of silence as part of its college and graduate school commencement exercises. Accordingly, the moment of silence practice applied exclusively to adults in the university setting, rather than to primary and secondary school children, as was the case in *Wallace* and as is the case here. In upholding the practice, the Sixth Circuit stressed this difference in the age of the audience, explaining that "the obvious difference between plaintiffs such as Dr. Chaudhuri and children at an impressionable stage of life 'warrants a difference in constitutional results.'" *Chaudhuri*, 130 F.3d at 239.
>
> b. Similarly, the Eleventh Circuit's opinion upholding a Georgia moment of silence statute in *Bown*, *supra*, is distinguishable in several critical respects. The Georgia minute of silence statute arose in different circumstances, and did not contain the reference to prayer that is included in the Virginia statute presently in dispute. Indeed, Georgia's legislature expressly ***removed***

references to prayer that were contained within a prior moment of silence statute, a fact that influenced the Eleventh Circuit's ruling. *Bown*, 112 F.2d at 1469 n.3.

Even had the *Bown* and *Chaudhuri* decisions permitted minute of silence statutes analogous to the one at issue here, the untenable conflict would still exist because such a statute was found unconstitutional in Alabama in *Wallace*. Indeed, even if such statutes were upheld in the other 49 states, the conflict with this Court's precedent remains.

Petitioners respectfully submit that the federal system cannot easily tolerate the situation in which essentially the same statute, in different states, yields different constitutional results. Accordingly, because the Fourth Circuit's decision creates a conflict as to the constitutionality of like statutes in different states, this Court should grant the petition to resolve this conflict. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 923 (2000) (granting certiorari to resolve conflict created by decisions finding analogous partial birth abortion statutes constitutional in Illinois and Wisconsin but unconstitutional in Nebraska); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 638 (1974) (granting certiorari to resolve conflict whereby nearly identical mandatory maternity leave rules for public school teachers were deemed constitutional in Virginia but invalid in Ohio); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 144 (1989) (granting certiorari to resolve conflict whereby a Florida "direct moulding law" was found to violate federal patent laws but an analogous California statute was upheld).

III. REVIEW SHOULD BE GRANTED BECAUSE THIS CASE RAISES IMPORTANT QUESTIONS REGARDING DISCERNING LEGISLATIVE PURPOSE UNDER THE ESTABLISHMENT CLAUSE.

The questions of how to examine legislative purpose and how to weigh statements of individual legislators in Establishment Clause cases—particularly where there allegedly are multiple purposes—have proven vexing for the lower courts. Because these inquiries are often dispositive, review should be granted to resolve these important questions regarding the application of this Court's standards for determining legislative purpose under the *Lemon* test.

In *Wallace*, this Court found it sufficient to invalidate Alabama's minute of silence statute because it was motivated by an improper purpose. This Court examined various factors as indicia of the legislature's intent, including the statements of the bill's sponsor regarding the statute's purpose. *See Wallace*, 472 U.S. at 56-57. However, the Court's inquiry did not rest on those statements, but instead encompassed an examination of the text of the statute, its legislative history, the sequence of events leading to its passage, and the context in which it was enacted. *See id.* at 57-60. The Court also rejected the "secular purposes" proffered by the State of Alabama in defense of the statute. *See id.* at 57-58 n.45.

Likewise, in *Santa Fe*, this Court found an impermissible purpose motivating a Texas school district's policy of allowing for prayers to be delivered by students over the school's public address system prior to high school varsity football games and, on that ground, invalidated the district policy. 530 U.S. at 314-315. The Court rejected the school district's proffered secular purposes, instead looking to the text of the policy, its history and tradition, and the circumstances surrounding its enactment to conclude that the

policy was implemented with the purpose of endorsing school prayer. *See id.*

The Court followed a similar approach in invalidating Louisiana's "Creationism Act" on the basis that it was prompted by an impermissible purpose. *See Edwards*, 482 U.S. at 586-94. There, the Court looked beyond the Act's stated secular purpose and, upon a review of the statute's text, historical context, legislative history and specific sequence of events leading to its passage, concluded that Act was instead motivated by the primary purpose of endorsing a particular religious doctrine. *See id.* at 594-95.[8]

The Court's Establishment Clause focus on purpose is significant. *See Santa Fe*, 530 U.S. at 314 ("Our Establishment Clause cases involving facial challenges . . . have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose."). This is because an improper government purpose fatally undermines the rights guaranteed by the Religion Clauses. As this Court has properly and consistently recognized, when government conveys a message of religious purpose—manifested in a statute or official policy—the State thereby exercises a coercive power over its citizens to adhere to that religious intent and thereby necessarily tends toward the establishment of religion. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *See Engel*, 370 U.S. at 431; *Wallace*, 472 U.S. at 70

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[8] Recognizing this and other authority, the dissent below aptly stated that "[w]e are bound by duty to look below the surface; otherwise, a statute could run afoul of the Establishment Clause only in a *Wallace*-type situation where legislators are blatantly motivated by impermissible religious considerations. The mandate of the Establishment Clause cannot be so easily and disingenuously evaded." Pet. App. 33a (King., J., dissenting).

(O'Connor, J., concurring.) Thus, even if the statute was never implemented, it is the attempt by the state to encourage prayer that is at issue. *Santa Fe*, 530 U.S. at 316. Because the State's *attempt* to convey a message of religious purpose necessarily tends to influence the public towards conformance to that viewpoint—particularly in the public school setting—once this purpose is clear, "[w]e need not wait for the inevitable to confirm and magnify the constitutional injury." *Id.* "Government efforts to endorse religion cannot evade constitutional reproach based solely on the remote possibility that those attempts may fail." *Id.*

Here, the Fourth Circuit failed to appreciate the importance of those concerns. To the contrary, the court of appeals concluded that the statute carried a proper purpose principally because it was not accompanied by an unqualified express statement of *impermissible* purpose. Pet. App. 21a-22a. This approach not only failed to adequately consider the other indicia of impermissible intent littered throughout the text, legislative history, context, and sequence of events surrounding the passage of the Virginia minute of silence law, but it failed to consider the coercive impact upon students who reasonably perceive the minute of silence to be about prayer. The Fourth Circuit improperly emphasized what it saw as the absence of *official statements* that the General Assembly enacted the minute of silence law *solely* to return prayer to the classroom in "open defiance of federal constitutional law." Pet. App. 23a.

That is not the approach that this Court has taken. To the contrary, this Court has invalidated state action that intentionally and substantially furthers a religious purpose even if it also incidentally serves a non-religious goal. *See, e.g., Stone v. Graham*, 449 U.S. 39, 41 (1980) (although the State plainly had *some* secular objectives in posting the Ten Commandments in the public schools, there was sufficient religious purpose to warrant invalidation of such action under the Establishment Clause); *Sch. Dist. of Abington v. Schempp*,

374 U.S. 203, 224 (1963) (state action requiring schools to begin each day with Bible readings violated the Establishment Clause because, "even if [the state's] purpose is not strictly religious," the intent was of a sufficiently religious nature to infringe upon the First Amendment); *Edwards*, 482 U.S. at 594 (invalidating statute that had the "primary purpose" of endorsing religion). The purpose test requires that government activity be motivated by secular purposes and "[t]hat requirement is not satisfied . . . by the mere existence of *some* secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (emphasis added).

The inquiry into purpose, in many cases, is a difficult one. However, one thing is clear: the inquiry should not turn on the absence or presence of an "official" statement of facially impermissible intent. This Court has looked behind such self-serving proclamations as a matter of course. *See, e.g.*, *Edwards*, 482 U.S. at 586-95; *Santa Fe*, 530 U.S. at 314-15. The Court should grant the petition in order to provide guidance to the lower courts as to the appropriate framework to utilize in determining what is and is not a permissible state purpose under the Establishment Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 31, 2001

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-2132, No. 00-2400

ED BROWN, as parent and next friend of Vanessa Brown; ROSALYNNE BROWN, as parent and next friend of Vanessa Brown; VANESSA BROWN, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; MARC J. COHEN, as parent and next friend of Amy and Michael Cohen; MICHAEL COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; AMY COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; FRANK M. FEIBELMAN, as parent and next friend of Seth Feibelman; SETH FEIBELMAN, a minor child attending Henrico County Middle School in Henrico County, Virginia; GREGORY KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; PATRICIA KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; KATHRYN ANYA KRUGLAK, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; JEFFREY M. LEPON, as parent and next friend of Jana Lepon and Ariel Lepon; CORA YAMAMOTO, as parent and next friend of Jana Lepon and Ariel Lepon; JANA LEPON, a minor child attending Longfellow Middle School in Fairfax County, Virginia; ARIEL LEPON, a minor child attending Haycock Elementary School in Fairfax County, Virginia; WAYNE GRAY, as parent and next friend of Robyn Gray; DEBORAH GRAY, as parent and next friend of Robyn Gray; ROBYN GRAY, a minor child attending White Oak Elementary School in Fairfax County, Virginia; MARK MAGRUDER, as parent and next friend of Mia MaGruder; ELLA MAGRUDER, as parent and next friend of Mia MaGruder;

MIA MAGRUDER, a minor child attending Amherst Middle School in Amherst County, Virginia; ROY KUPERSMITH, as parent and next friend of Jordan Kupersmith; ADRIANA KUPERSMITH, as parent and next friend of Jordan Kupersmith; JORDAN KUPERSMITH, a minor child attending Potomac Falls High School in Loudoun County, Virginia,

Plaintiffs-Appellants,

v.

JAMES GILMORE, The Honorable James Gilmore in his official capacity as Governor of the Commonwealth of Virginia; WILBERT BRYANT, The Honorable Wilbert Bryant in his official capacity as Virginia Secretary of Education; JO LYNNE DEMARY, in her official capacity as Virginia Superintendent of Public Instruction; VIRGINIA BOARD OF EDUCATION; VIRGINIA DEPARTMENT OF EDUCATION; DANIEL DOMENECH, in his official capacity as Division Superintendent Fairfax County Public Schools; MARK A. EDWARDS, in his official capacity as Division Superintendent Henrico County Public Schools; JOHN J. DANIELS, in his official capacity as Division Superintendent Amherst County Public Schools; THE FAIRFAX COUNTY SCHOOL BOARD; HENRICO COUNTY SCHOOL BOARD; AMHERST COUNTY SCHOOL BOARD; EDGAR B. HATRICK, in his official capacity as Division Superintendent Loudoun County Public Schools; LOUDOUN COUNTY SCHOOL BOARD,

Defendants-Appellees.

ED BROWN, as parent and next friend of Vanessa Brown; ROSALYNNE BROWN, as parent and next friend of Vanessa Brown; VANESSA BROWN, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; MARC J. COHEN, as parent and next friend of Amy and Michael Cohen; MICHAEL COHEN, a

minor child attending Spring Hill School in Fairfax, Virginia; AMY COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; FRANK M. FEIBELMAN, as parent and next friend of Seth Feibelman; SETH FEIBELMAN, a minor child attending Henrico County Middle School in Henrico County, Virginia; GREGORY KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; PATRICIA KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; KATHRYN ANYA KRUGLAK, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; JEFFREY M. LEPON, as parent and next friend of Jana Lepon and Ariel Lepon; CORA YAMAMOTO, as parent and next friend of Jana Lepon and Ariel Lepon; JANA LEPON, a minor child attending Longfellow Middle School in Fairfax County, Virginia; ARIEL LEPON, a minor child attending Haycock Elementary School in Fairfax County, Virginia; WAYNE GRAY, as parent and next friend of Robyn Gray; DEBORAH GRAY, as parent and next friend of Robyn Gray; ROBYN GRAY, a minor child attending White Oak Elementary School in Fairfax County, Virginia; MARK MAGRUDER, as parent and next friend of Mia MaGruder; ELLA MAGRUDER, as parent and next friend of Mia MaGruder; MIA MAGRUDER, a minor child attending Amherst Middle School in Amherst County, Virginia; ROY KUPERSMITH, as parent and next friend of Jordan Kupersmith; ADRIANA KUPERSMITH, as parent and next friend of Jordan Kupersmith; JORDAN KUPERSMITH, a minor child attending Potomac Falls High School in Loudoun County, Virginia,

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JAMES GILMORE, The Honorable James Gilmore in his official capacity as Governor of the Commonwealth of Virginia; WILBERT BRYANT, The Honorable Wilbert Bryant in his official capacity as Virginia Secretary of

Education; JO LYNNE DEMARY, in her official capacity as Virginia Superintendent of Public Instruction; VIRGINIA BOARD OF EDUCATION; VIRGINIA DEPARTMENT OF EDUCATION; DANIEL DOMENECH, in his official capacity as Division Superintendent Fairfax County Public Schools; MARK A. EDWARDS, in his official capacity as Division Superintendent Henrico County Public Schools; JOHN J. DANIELS, in his official capacity as Division Superintendent Amherst County Public Schools; THE FAIRFAX COUNTY SCHOOL BOARD; HENRICO COUNTY SCHOOL BOARD; AMHERST COUNTY SCHOOL BOARD; EDGAR B. HATRICK, in his official capacity as Division Superintendent Loudoun County Public Schools; LOUDOUN COUNTY SCHOOL BOARD,

Defendants-Appellees.

May 8, 2001, Argued
July 24, 2001, Decided

Before NIEMEYER, WILLIAMS, and KING, *Circuit Judges*. Judge Niemeyer wrote the opinion, in which Judge Williams joined. Judge King wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

In 2000, the Commonwealth of Virginia amended a 1976 statute to mandate that each school division in the state establish in its classrooms a "minute of silence" so that "each pupil may, in the exercise of his or her individual choice, *meditate, pray, or engage in any other silent activity* which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." Va. Code Ann. § 22.1-203 (Michie 2000) (emphasis added). Several Virginia students and their parents commenced this action to challenge

this statute on its face, contending that it establishes religion in violation of the First Amendment. The district court rejected the challenge, and we affirm.

I

In 1976, Virginia enacted into law § 22.1-203. This provision *authorized*, but did not require, local school boards to establish a minute of silence in their classrooms for the expressly stated purpose of allowing students to meditate, pray, or engage in any other silent activity. In 1994, the Virginia General Assembly required the Virginia Board of Education to adopt guidelines on religious activities in the schools. *See* Va. Code Ann. § 22.1-280.3. As directed, the Board of Education adopted "Guidelines Concerning Religious Activities in the Public Schools," in which it provided:

> Public schools may provide students . . . with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. A brief minute of silence may also fulfill other secular objectives, including maintenance of discipline.
>
> * * *
>
> The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. The teacher should also not use the time to pray aloud in front of other students, nor permit any other student, or groups of students, to pray aloud.

Acting under the authority of the 1976 law, at least 14, and perhaps 20 school divisions in Virginia chose to establish a minute of silence in their classrooms, and a survey conducted by the Virginia Superintendent of Schools revealed that this minute of silence has not led to any peer-on-peer religious harassment.

In 2000, the Virginia legislature amended § 22.1-203 to *require* that every school division provide a minute of silence in the State's public school classrooms and to direct the Attorney General to defend the statute when it is challenged in court. The amended law became effective July 1, 2000.[1]

Senator Warren Barry, who sponsored Senate Bill 209 ("SB 209") containing the 2000 amendments to Virginia Code § 22.1-203, explained to the press that he introduced the bill in response to some recent highly publicized incidents of school violence with the hope that encouraging regular introspection by students would somehow lessen the urges of students to resort to violence. When asked by a newspaper reporter about his intent in sponsoring the bill, Senator Barry responded that his intent was not to force prayer in schools, but he added, "This country was based on belief in God, and maybe we need to look at that again." [2]

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[1] The following shows how Va. Code Ann. § 22.1-203 was amended in 2000:

> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division ~~is authorized to~~ *shall* establish the daily observance of one minute of silence in each classroom of the division.
>
> ~~Where~~ *During* such one-minute period of silence ~~is instituted~~, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.
>
> *The Office of the Attorney General shall intervene and shall provide legal defense of this law.*
>
> (Italics show additions and strike-through show deletions)

[2] The parties disagree whether statements to the press are admissible as exceptions to the hearsay rule. We do not decide this question but include

During debate of SB 209, some of the senators manifested their concern about the constitutionality of the bill. Senator Edward Houck of Spotsylvania stated that, given the religious diversity of his constituents—"Christians and Muslims and Hindus and atheists"—the proposed amendments, despite the fact that they were "pure in terms of [their] intent," would amount to "crossing the line." Accordingly, he urged his colleagues to "insulate . . . all of our teachers and our school divisions from that tricky wicket of what is religious freedom and what is not" by striking the meditation and prayer language from the bill. Senator Stephen Newman of Lynchburg criticized this position because such an altered bill would lack any "indication . . . [of] what those students are [going to] be doing at all [during the minute of silence]. They, simply will be quiet with no purpose." Senator Newman explained further that the use of the terms "meditation, prayer and reflection" gives direction to what may be done during the minute of silence, but in no way could be viewed as sectarian. Similarly, Senator Barry, the bill's sponsor, rejected any interpretation that associated the bill with school prayer. He stated:

> The purpose of the Bill has been stated and restated is not a religious crusade. It's not to try and re-inject prayer into the public school system. The primary thing was out of the frustrations that many of us have felt based on the violence in some of our schools, such as Columbine and the Kinkley (ph.) situation in Oregon. This was simply an opportunity, hopefully, that kids in school would reflect if more than anything else. I'm saying, we're not putting prayer on a higher pedestal or a lower pedestal than meditate and reflect. But if students would just spend one minute to reflect on who they are, what

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this statement only for the sake of completeness. We do not, however, believe that its inclusion materially adds or detracts from the views of legislators contained in the legislative record.

> they're doing and where they're going. The word prayer in there was put in there so prayer would not be discriminated against.

SB 209 passed the Virginia Senate in the form introduced.

In the House of Delegates, Delegate Robert McDonnell, the House floor manager of the bill, explained that the bill was grounded in both "sound public policy" and the secular purposes "of maintaining good order and discipline, creating student focus on the activities at hand and assisting the teachers in beginning the day with a period of calm which would lead to better discipline in the classroom." He added:

> [Our students] are involved in so many activities, we expect the best out of our students. So, many of the experts certainly would agree and I think it has borne out in the localities that have implemented [the 1976 statute], that this certainly also helps not only with the focus but also perhaps with stress reduction in having a period of concentrated silence as they begin the school day.

The House, too, passed SB 209, and Governor James Gilmore signed it into law on April 19, 2000.[3]

In his "*Sine Die*" statement to the General Assembly at the conclusion of its 2000 term, Governor Gilmore praised the passage of SB 209, stating that it would "restore a sense of calm and civility in public schools by offering students a peaceful minute each day to reflect upon their studies, to collect their thoughts, or, if they so choose, to bow their heads and pray."

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[3] The same General Assembly that enacted SB 209 also enacted House Joint Resolution 71, which consisted of a request to Congress that it take steps to amend the federal Constitution so as to permit voluntary school prayer of the type that had been found unconstitutional by the Supreme Court in its landmark decision of *Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962).

On June 13, 2000, the Virginia Department of Education directed a memorandum to school division superintendents and public school principals in Virginia informing them of the changes to Virginia Code § 22.1-203 that were made through SB 209. The memorandum stated that the "legislation reflects the view that [Virginia's] young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each day." The memorandum suggested, as an appropriate format for conducting a minute of silence, that the teacher say, "As we begin another day, let us pause for a moment of silence." The same memorandum warned against permitting or tolerating "any coercion or overbearing by some students to force others to engage in or refrain from prayer or any other permitted activity. This time is not intended to be and shall not be conducted as a religious service or exercise."

A little more than a week later, but before the statute's effective date on July 1, the plaintiffs commenced this action facially challenging § 22.1-203 under the First and Fourteenth Amendments of the U.S. Constitution. They alleged in their complaint that the minute of silence statute violates the Establishment Clause because its purpose was to advance prayer in public schools. The plaintiffs sought a declaratory judgment that the statute was unconstitutional and an injunction prohibiting its enforcement.

Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), the district court concluded, by order dated October 26, 2000, that the minute of silence statute "was enacted for a secular purpose, does not advance or inhibit religion, nor is there excessive entanglement with religion." It found, accordingly, that the

statute was not unconstitutional and granted summary judgment in favor of the defendants. This appeal followed.[4]

Summarizing on appeal their contention that Virginia's minute of silence statute violates the First Amendment, the plaintiffs state:

> The statute's plain language, coupled with the contemporaneous statements, understandings and actions of the legislators who passed it and the Governor who signed it, all unambiguously indicate that the new Minute of Silence Law was intended to return voluntary prayer to the public school classroom. The bill's sponsor publicly stated the religious motives underlying the statute. Members of both the Senate and House of Delegates expressed their understanding and desire that the Minute of Silence is about prayer. The Virginia legislature purposely rejected proposed amendments to the Minute of Silence bill that would have removed the word "pray" from the statute.

They also argue that the statute is "in all relevant respects" analogous to the moment of silence statute that was held unconstitutional in *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985) (applying the test announced in Lemon).

II

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting

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[4] On August 31, 2000, the district court denied the plaintiffs' motion for a preliminary injunction to prohibit enforcement of the statute. By order dated September 5, 2000, we denied the plaintiffs' emergency motion for injunction pending appeal. While the appeal from the denial of plaintiffs' motion for a preliminary injunction is also before us, that appeal is resolved by our decision in the appeal on the merits, taken from the summary judgment entered in favor of the defendants on October 26, 2000.

the free exercise thereof." U.S. Const. amend. I. These Religion Clauses are made applicable to the states through the Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8, 91 L. Ed. 711, 67 S. Ct. 504 (1947) (applying the Establishment Clause to the states); *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940) (applying the Free Exercise Clause to the states).

Both clauses are designed to protect religious liberty. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) (noting that "the common purpose of the Religion Clauses 'is to secure religious liberty'" (*quoting Engel v. Vitale*, 370 U.S. 421, 430, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962)); Michael W. McConnell, *Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 1* ("Religious liberty is the central value and animating purpose of the Religion Clauses"). The Establishment Clause limits any governmental effort to promote particular religious views to the detriment of those who hold other religious beliefs or no religious beliefs, while the Free Exercise Clause affirmatively requires the government not to interfere with the religious practices of its citizens. Religion, accordingly, as distinct from other moral or philosophical systems, is singled out in the Constitution for the special protections contained in the Religion Clauses. *Cf. Gillette v. United States*, 401 U.S. 437, 454, 28 L. Ed. 2d 168, 91 S. Ct. 828 (1971) (upholding against an Establishment-Clause challenge an exemption from an otherwise generally applicable draft law that permitted exemption for those with religious, rather than moral, objection to war). Thus, the Religion Clauses must not be interpreted with a view that religion be suppressed in the public arenas in favor of secularism. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313 (noting that "by no means do these commands [of the Religion Clauses] impose a prohibition on all religious activity in our public schools"); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984) (stating that religion must be accommodated and

that "anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause"); *Sch. Dist. of Abingdon Township v. Schempp*, 374 U.S. 203, 225, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) ("The State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion" (*quoting Zorach v. Clauson*, 343 U.S. 306, 314, 96 L. Ed. 954, 72 S. Ct. 679 (1952)); *Zorach*, 343 U.S. at 314 (noting that if the government could not "respect[ ] the religious nature of our people and accommodate[ ] the public service to their spiritual needs," that would be to "prefer[ ] those who believe in no religion over those who do believe").

The Establishment Clause, on which the plaintiffs rely in this case, prohibits governmental establishment of a religion in the sense of "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970). But this clause does not require total separation of Church and State. "[T]his Nation's history has not been one of entirely sanitized separation between Church and State," and it "has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973); *accord Lynch*, 465 U.S. at 673. Thus, just as the Free Exercise Clause does not give the citizen having religious scruples an absolute right to escape the burdens of otherwise valid, neutral laws of general applicability, *see Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872, 881-82, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), neither does the Establishment Clause preclude a government from "accommodating" religious scruple by, for example, voluntarily exempting those with the particular religious scruple from the burden imposed by the legislation, even though the Constitution would not, in that circumstance, oblige an accommodation, *see id.* at 890. Not only is the government permitted to accommodate religion

without violating the Establishment Clause, at times it is required to do so. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144, 94 L. Ed. 2d 190, 107 S. Ct. 1046 (1987) ("The government may (and sometimes must) accommodate religious practices"); *Lynch*, 465 U.S. at 673 (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions"). And the limits of permissible accommodation are not "coextensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673; *accord Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987). "This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice." *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 287 (4th Cir. 2000). It is true, however, that "at some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Amos*, 483 U.S. at 334-35 (*quoting Hobbie*, 480 U.S. at 145).

The line between improper establishment and accommodation "must be delicately drawn both to protect the free exercise of religion and to prohibit its establishment." *Ehlers-Renzi*, 224 F.3d at 288. But the Supreme Court has repeatedly drawn that line in a manner that has upheld a broad range of statutory accommodations against Establishment Clause challenges. *See, e.g., Amos*, 483 U.S. at 330 (upholding Title VII's exemption of religious employers even in the context of their non-religious activities); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 53 L. Ed. 2d 113, 97 S. Ct. 2264 (1977) (applying Title VII's requirement that employers reasonably accommodate their employees' religious requirements); *Gillette v. United States*, 401 U.S. 437, 454, 28 L. Ed. 2d 168, 91 S. Ct. 828 (1971) (upholding

against an Establishment Clause challenge a statutory exemption from the draft limited to individuals whose religious beliefs cause them to oppose war in any form); *Zorach v. Clauson*, 343 U.S. at 315 (upholding "released time" program for religious instruction of public school children). And in *Lemon*, the Supreme Court articulated a test to guide courts in drawing that line, a test that, while criticized over the years, remains binding precedent. *See Ehlers-Renzi*, 224 F.3d at 288. Under *Lemon*, to withstand an Establishment Clause challenge, (1) a statute must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster an excessive governmental entanglement with religion. *See* 403 U.S. at 612-13.

III

Because this appeal comes to us in the posture of a facial, preapplication challenge, our inquiry is limited by the absence of a factual record relating to how the statute is applied. Nevertheless, on a facial challenge, we may still scrutinize a statute, based on its text, context, and legislative history, to determine whether under *Lemon* it has an unconstitutional purpose. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312-17. And even though we must not speculate about a statute's application in considering the second and third prongs of the *Lemon* test, we can examine the available data to determine the statute's "inevitable" effects. *Id.* at 316. It is under this analytical structure, therefore, that we now turn to consider the plaintiffs' facial challenge to Va. Code Ann. § 22.1-203.

IV

In applying the first prong of the *Lemon* test—whether § 22.1-203 has a secular legislative purpose—we need not find that the purpose be "exclusively secular." *Lynch*, 465 U.S. at 681 n.6; *see also Wallace*, 472 U.S. at 56. In *Wallace*,

the court noted that even though a statute may have a religious purpose, it may still satisfy the *Lemon* test if it also has a "clearly secular purpose." *Id.* Moreover, we have observed that this first prong of *Lemon* is "a fairly low hurdle," *Koenick v. Felton*, 190 F.3d 259, 266 (4th Cir. 1999) (*quoting Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995) (Luttig, J., concurring in the judgment) (internal quotation marks omitted)), so that a statute fails on this account when "there is no evidence of a legitimate, secular purpose," 190 F.3d at 265 (emphasis added). Finally, in assessing a statute's purpose we act with appropriate deference to the legislature. *See Wallace*, 472 U.S. at 74 (O'Connor, J., concurring in the judgment) ("[I]nquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited").

The minute of silence statute in this case recites that in recognition of the right of pupils to the free exercise of religion and the right of pupils to be free from "pressure from the Commonwealth" to engage or not engage in any religious observation, the Commonwealth was establishing a minute of silence in each classroom. Va. Code Ann. § 22.1-203. The statute states that the minute of silence is explicitly offered to the students for any non-distracting purpose—religious or nonreligious—including prayer or meditation. *See id.* It provides specifically, "each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice." *Id.* On its face, therefore, the statute provides a neutral medium—silence—during which the student may, without the knowledge of other students, engage in religious or nonreligious activity. And its stated purposes include the allowance of both religious and nonreligious activity with the only limitation that it be conducted in a manner that preserves the silence and does not interfere with other students' silent activity. Thus, as written in the statute, the silence is designed

to be undirected and unthreatening; it is designed to compromise no student's belief or nonbelief; and it is designed to exert no coercion except that of maintaining silence.

Based on this textual analysis, we conclude that the statute has at least two purposes, one of which is clearly secular and one of which may be secular even though it addresses religion. To the extent that the minute of silence is designed to permit nonreligious meditation, it clearly has a nonreligious purpose. And to the extent it is designed to permit students to pray, it accommodates religion. Even though religion is thus the object of one of the statute's purposes, the *accommodation* of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2, 103 L. Ed. 2d 1, 109 S. Ct. 890 (plurality opinion) (Brennan, J.) (noting that a state may reasonably conclude "that religious groups generally contribute to the cultural and moral improvement of the community . . . and enhance a desirable pluralism of viewpoint and enterprise"); *id.* at 38 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring) (stating the view that the Court ought to acknowledge openly that the religious purpose in an accommodation statute "is legitimated by the Free Exercise Clause," and that such statutes do not, solely for that reason, amount to unconstitutional "endorsements" of religion because they are consistent with the values of the Constitution).

Taking our analysis beyond the text of § 22.1-203 to the context of its enactment and its legislative history, the evidence does not alter the conclusion that is suggested by the plain meaning of the statute. The superintendent of Virginia's schools noted that in her experience, a moment of silence has proved to be "a good classroom management tool" because it "works as a good transition, enabling students to pause, settle

down, compose themselves and focus on the day ahead" making for "a better school day." This is consistent with statements made by Senator Barry and Senator Newman. Senator Barry explained that the statute was enacted to provide an opportunity during which "kids in school would reflect if more than anything else." He indicated that he included prayer in the list of activities permitted during the minute so that prayer would not be excluded or discriminated against. Even Senator Houck, who wanted the word "pray" to be deleted from the statute, acknowledged the statute's secular intent. Indeed, the Department of Education's Guidelines, which were in effect for many years before the 2000 amendments, focused most on the beneficial non-religious purposes provided by a quiet time.[5] While there can be no doubt from the legislative history that the moment of silence was intended also to accommodate those children who wished to pray silently each day in school, that was but one of the intended purposes.

A statute having dual legitimate purposes—one clearly secular and one the accommodation of religion—cannot run afoul of the first *Lemon* prong, which requires only that there be a secular purpose. Indeed, the Wallace Court noted that even though a statute is "motivated in part by a religious purpose" it may still satisfy the *Lemon* test. 472 U.S. at 56 (citing *Abingdon Sch. Dist. v. Schempp*, 374 U.S. 203, 296-303, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) (Brennan, J., concurring).

Consideration of the final two prongs of the *Lemon* test need not detain us long because the facial challenge is mounted without evidence of the statute's application in fact.

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[5] In their argument before the district court, the plaintiffs themselves acknowledged, "[I]t's a good thing for children to start the day with some reflection. It is probably a very good thing. . . . [I]t would help . . . every . . . child to do that."

The second prong—that the statute's effect neither advance nor hinder religion—is clearly satisfied in this case given the statute's facial neutrality between religious and nonreligious modes of introspection and other silent activity. *See Widmar v. Vincent*, 454 U.S. 263, 273, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (noting that even foreseeable benefits that religion receives from enactment of broad legislation are only "'incidental'" and "do[ ] not violate the prohibition against the 'primary advancement' of religion") (quoting *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771, 37 L. Ed. 2d 948, 93 S. Ct. 2955 (1973)). Plaintiffs argue, however, that despite the statute's facial neutrality between silent religious expression and silent nonreligious expression, the statute's inevitable effect—given its broad application to children, beginning in kindergarten and continuing through the twelfth grade—will be to promote prayer by creating the perception, especially from the viewpoint of young, impressionable school children, that the Commonwealth endorses prayer. In the context of a facial challenge, however, this fear is speculative at best. Despite language in Supreme Court precedent recognizing the impressionability of elementary school children and the greater threat of religious coercion attendant to religious displays in elementary schools, *see, e.g., Lee v. Weisman*, 505 U.S. 577, 592-93, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390, 87 L. Ed. 2d 267, 105 S. Ct. 3216 (1985), nothing the Court has said "suggests that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue," *Good News Club v. Milford Cent. Sch.*, 121 S. Ct. 2093, 2105, 150 L. Ed. 2d 151 (U.S. 2001). To hold otherwise, especially in the context of a facial challenge, would result in the introduction of "a modified heckler's veto, in which . . . religious activity can be proscribed on the basis" of sincere, but utterly mistaken perceptions of state endorsement of religion. *Id.* at 2106.

Therefore, speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity.

And the third prong—that the State not become excessively entangled with religion—is undoubtedly satisfied. If we assume that the statute will be enforced as written and that the teachers will apply it as directed by the superintendent, the teacher will simply inform the students of their statutory options during an enforced minute of silence. Its involvement in religion is negligible, left only to informing students that one of the permissible options during the moment of silence is prayer. If the students were kept uninformed of that right, they might find it necessary to ask teachers whether the allotted time might be used for prayer, increasing the potential for interactions between teachers and religiously motivated students. *See Wallace*, 472 U.S. at 91 (White, J., dissenting).

In sum, in establishing a minute of silence, during which students may choose to pray or to meditate in a silent and nonthreatening manner, Virginia has introduced at most a minor and nonintrusive accommodation of religion that does not establish religion. By providing this moment of silence, the State makes no endorsement of religion. Indeed, when instructing Virginia teachers on the implementation of the statute, State officials warned that teachers are not to permit or tolerate "any coercion or overbearing by some students to force others to engage in or refrain from prayer or any other permitted activity." There is simply no evidence to indicate that Virginia has promoted any religion or promoted religion over nonreligion. Recognizing that the Religion Clauses of the Constitution are intended to protect religious liberty, Virginia's minute of silence is no more than a modest step in that direction by providing a non-intrusive and constitutionally legitimate accommodation.

V

While our independent analysis of the Virginia statute under *Lemon* leads to the conclusion that it is a "permissible accommodation" of religion, the plaintiffs argue that this conclusion is foreclosed by the specific holding of *Wallace*, in which an Alabama moment-of-silence statute was held unconstitutional. More particularly, they maintain that because the Alabama statute struck down in *Wallace* is indistinguishable from the Virginia statute under consideration here, *Wallace* is "dispositive." For the reasons that follow, we disagree.

A fair reading of *Wallace* compels the conclusion that its holding was based on the unique facts presented in that litigation and that its decision did not categorically prohibit moment-of-silence statutes. The Supreme Court in *Wallace* distinguished its case as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday," 472 U.S. at 59, a passage that was cited with approval in the Court's decision in *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313. The outcome in *Wallace* was the culmination of Alabama's attempt to overturn *Everson v. Board of Educ.*, 330 U.S. 1, 14-16, 91 L. Ed. 711, 67 S. Ct. 504 (1947), which rendered the Establishment Clause applicable to the States through the Fourteenth Amendment. As part of its campaign of defiance, Alabama enacted three statutes: Section 1601-20, enacted in 1978, which authorized a one-minute period of silence in all public schools "for meditation"; Section 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; and Section 16-1-20.2, enacted in 1982, which authorized "willing students" to be lead by authorized teachers in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."

At the preliminary-injunction stage, the district court concluded that the meditation statute, the 1978 enactment, was not objectionable but that the other two statutes were invalid because, as a factual matter, "the sole purpose of both was 'an effort on the part of the State of Alabama to encourage religious activity.'" *Wallace*, 472 U.S. at 41 (*quoting Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982). With respect to the 1981 enactment, which authorized meditation or prayer, the district court found that the statute failed Lemon's first prong because the prime sponsor of the legislation testified under oath that the legislation was promoted and passed only in an "effort to return voluntary prayer to our public schools." 472 U.S. at 43. The court also found that Alabama teachers had already begun leading their students in collective prayers, over communicated objections of the plaintiff children. *See Jaffree v. Bd. of Sch. Comm'rs of Mobile County*, 554 F. Supp. 1104, 1107-08 (S.D. Ala. 1983).

Reviewing this record, the Supreme Court observed that it "reveals that the enactment of § 16-1-20.1 [the 1981 enactment that provided for meditation or prayer] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose." *Wallace*, 472 U.S. at 56 (emphasis in original). The lack of secular purpose for the challenged legislation was shown by the uncontroverted legislative history of the statute as well as live testimony before the trial court. Not only did the Governor of Alabama testify that the State's intent was to have prayer as part of daily classroom activity, but the State also made no claim that the statute was enacted to accommodate the free exercise of religion until late in the litigation. The Supreme Court reached the conclusion that the 1981 enactment had an unlawful purpose also because of the language of the two other statutory provisions involved in the litigation, the 1978 enactment (providing for meditation) and the 1982 enactment (providing for prayer to Almighty God). While the 1982 enactment had a

"wholly religious character" that was "plainly evident from its text," *id.* at 58, the "wholly religious character" of the 1981 enactment was more subtle but no less certain when its language was compared to that of the 1978 predecessor (providing only for meditation). Thus, the Supreme Court noted that "while the [legislative intent] merely [to] protect every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day" was constitutionally unobjectionable, the 1978 statute, providing for meditation, had already protected that right, and thus, the enactment of the 1981 statute, providing for meditation and prayer, did not, and could not, as a logical matter, further "any secular purpose that was not fully served by [the 1978 enactment]." *Id.* at 59. Accordingly, only two conclusions were consistent with the passage of the 1981 enactment: Alabama enacted the statute either "(1) . . . to convey a message of state endorsement and promotion of prayer; or (2) . . . for no purpose." *Id.* at 59. Refusing to attribute irrationality to the Alabama legislature, the Supreme Court concluded that the statute was enacted for a rational, but plainly unlawful purpose.

In short, the Supreme Court observed that "the State did not present evidence of any secular purpose," *id.* at 57, and the purpose as singularly religious was confirmed from "consideration of the relationship between the statute at issue and the two other measures that were considered in the case," *id.* at 58. The Court made clear, however, that enacting a statute solely for a religious purpose is "*quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day.*" *Id. at 59* (emphasis added).

This admonition by the *Wallace* Court that its holding did not reach to moment of silence statutes that had both secular and religious purposes was confirmed in the separate concurring opinions of Justices Powell and O'Connor. Justice

Powell agreed that the evidence in the record indicated that the Alabama moment of silence statute was enacted solely for a religious purpose, rendering unnecessary any analysis under the other two prongs of the *Lemon* test. But he added, "Although we do not reach the other two prongs of the *Lemon* test, I note that the effect of a straightforward moment-of-silence statute is unlikely to advance or inhibit religion . . . nor would such a statute foster an excessive government entanglement with religion." *Id.* at 66 (Powell, J., concurring) (internal quotation marks and citations omitted). Similarly, Justice O'Connor noted that a moment of silence statute is not inherently religious and that during the moment of silence a student who objects to prayer is left to his or her own thoughts and not compelled to listen to the prayers or thoughts of others. She concluded, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Id.* at 73 (O'Connor, J., concurring in the judgment). Justice O'Connor's concurrence in *Wallace* also rejects one of the arguments advanced by plaintiffs in this litigation, namely, that Virginia's use of the word "pray" is dispositive of an intent to endorse prayer. *Wallace*, 472 U.S. at 73 ("Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives.").

The factual record of the case before us stands in stark contrast to the one presented to the Supreme Court in *Wallace*. First, there is no evidence that the Commonwealth of Virginia acted in open defiance of federal constitutional law. To the contrary, its debates reflected serious consideration of relevant Supreme Court precedents and concern that it act constitutionally in enacting its proposed statute. Indeed, rather than defy the Supreme Court by seeking to conduct an end run around its precedents, the Virginia House of Delegates passed a resolution requesting that Congress initiate a constitutional amendment.

In addition, the legislators clearly debated and acknowledged both religious and secular purposes for the proposed statute, describing the benefits of a minute of silence even for students who would not use the allotted time to pray.

Finally, unlike the Alabama teachers who admitted to leading their students in religious chants and prayers without even waiting for the passage of a State law authorizing such conduct, the Virginia teachers were operating under cautious guidelines circulated five years earlier. Moreover, after passage of the 2000 amendment, the superintendent of schools in Virginia directed a memorandum to all teachers, admonishing them not to permit the minute of silence to become a religious observance. There is no evidence in this record that Virginia teachers have used the minute of silence, or any other occasion, to lead their students in collective prayer, as was the case in *Wallace*.

The plaintiffs point to the fact that the 2000 amendments to Virginia's statute made the minute of silence mandatory throughout the State, therefore rendering it coercive. But we can find no material distinction between the 1976 version of § 22.1-203, in which a political subdivision was *authorized to impose* a minute of silence and the current statute where the State itself imposed the minute of silence. Both are mandatory minutes of silence for the students implicated, but neither is coercive in that the affected students are left to choose how they will use the minute of silence.

In short, the holding in *Wallace* is clearly distinguishable. Indeed, the Supreme Court went out of its way to distinguish that case from the one now before us.

VI

The Supreme Court has ruled clearly that state-sponsored prayer conducted in public schools violates the Establishment Clause of the First Amendment and that student-sponsored prayer in public schools *may* violate it because, in the

coercive context of the classroom, a vocal prayer infringes the religious liberty of students who would choose not to participate. A moment of silence, however, lacks this dispositive element of coercion. See *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 313; *Wallace*, 472 U.S at 72 (O'Connor, J., concurring in the judgment). Establishing a short period of mandatory silence does not *ipso facto* amount to the establishment of anything but silence.

The minute of silence established in Virginia by § 22.1-203 for each public school classroom is designed to provide each student at the beginning of each day an opportunity to think, to meditate, to quiet emotions, to clear the mind, to focus on the day, to relax, to doze, or to pray—in short, to provide the student with a minute of silence to do with what the student chooses. And just as this short period of quiet serves the religious interests of those students who wish to pray silently, it serves the secular interests of those who do not wish to do so. Because the state imposes no substantive requirement during the silence, it is not religiously coercive. Neither the teacher nor any student will know how any other student uses the time because it is, fortunately, inherent in the human constitution that what transpires in the mind cannot be known by others.

The statute's use of the word "pray," in listing an unlimited range of mental activities that are authorized during the minute of silence, cannot by itself be a ground for finding the statute unconstitutional. Indeed, to require a ban on the use of religiously related terms would manifest a hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution.

Accordingly, after considering the text of the statute, its legislative history, and the facts surrounding its enactment, we hold that Virginia Code Annotated § 22.1-203 (Michie 2000) does not violate the Establishment Clause of the First Amendment. The judgment of the district court is therefore

AFFIRMED.

DISSENT BY: KING

DISSENT:

KING, *Circuit Judge*, dissenting:

Today the majority spurns controlling precedent in upholding the constitutionality of a Virginia statute that establishes religion in the public schools of the Commonwealth. By mandating a "minute of silence" at the start of each schoolday, the Commonwealth has engaged in a thinly veiled attempt to reintroduce state-sanctioned prayer into its schools. *See* Va. Code Ann. § 22.1-203 (Michie 2000) (the "Virginia statute"). Because the Virginia statute is repugnant to the Constitution's Establishment Clause and erodes the separation between church and state, I must dissent.

The First Amendment, applicable to the states through the Fourteenth, explicitly declares that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I; *Cantwell v. Connecticut*, 310 U.S. 296, 303, 84 L. Ed. 1213, 60 S. Ct. 900 (1940). By making the Establishment Clause part of the supreme law of the land, the Framers sought to protect our citizenry from the coercive power of majoritarian government by denying it the authority to legislate in the furtherance of any religion. Through the ages, the Supreme Court has recognized the neutral, "hands off' role that government in our country must play regarding the establishment of religion. As Justice Clark eloquently stated years ago,

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 226, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963).

Although the majority characterizes it otherwise, the "minute of silence" mandated by the Virginia statute is, like the Trojan Horse, a hollow guise. But the citizens of Virginia have naught to fear from Greek soldiers. Instead, the Commonwealth bears its "gift" as a means of invading Justice Clark's "inviolable citadel"—the hearts and minds of Virginia schoolchildren—in an effort to once more usher state-sponsored religion into public schools.

I subscribe to religious tolerance and, as a Scottish Presbyterian, I have nothing against prayer—either self initiated or sponsored by and carried out by families and religious organizations. It is elementary, moreover, that under our Constitution and the Supreme Court's binding interpretations of it, the meticulous separation of church and state is designed not to protect government from religion, but to protect American citizens and their religious practices from government.

I.

The majority cannot uphold the constitutionality of the Virginia statute without directly contravening controlling Supreme Court precedent, most notably *Wallace v. Jaffree*, 472 U.S. 38, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S Ct. 2266 (2000).[1] These decisions

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[1] In emphasizing the importance of precedent, the Court has forcefully stated that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375, 70 L. Ed. 2d 556, 102 S. Ct. 703 (1982) (per curiam). As Chief Justice Rehnquist observed in *Dickerson v. United States*, "While *stare decisis* is not an inexorable command, . . . the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.

require us to conclude that the Virginia statute fails to pass constitutional muster under the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971) (holding that, to comport with the Establishment Clause, "first, the statute must have a secular legislative purpose").

Under the *Lemon* test's first prong, "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" *Wallace*, 472 U.S at 56 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690, 79 L. Ed. 2d 604, 104 S Ct. 1355 (1984) (O'Connor, J., concurring)). In making this determination, we may inquire "'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'" *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in judgment)). Given the circumstances surrounding enactment of the Virginia statute, we are compelled to answer these questions with a resounding "Yes!".[2]

"'530 U.S. 428, 443, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000) (internal citations and quotation marks omitted). There is, in this case, no special justification to depart from precedent. And even if there were, only the Supreme Court has the power to overrule one of its precedents. *See Wallace*, 472 U.S. at 47 n.26 (citation omitted).

[2] Because I conclude that the Virginia statute violates the *Lemon* test's first prong, it is unnecessary to address the test's second and third prongs, i.e., that the statute's "principal or primary effect must be one that neither advances nor inhibits religion," and that it "must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13 (internal citations and quotation marks omitted). As Justice Stevens observed in his opinion for the Court in Wallace, "No consideration of the second or third [*Lemon*] criteria is necessary if a statute does not have a clearly secular purpose." 472 U.S. at 56.

A.

The historical facts surrounding passage of the Virginia statute are undisputed; it is the interpretation of these facts that lies at the core of this controversy. Thus, we must bear in mind that our inquiry is "'in large part a legal question to be answered on the basis of judicial interpretation of social facts[,]'" and that "every government practice must be judged in its unique circumstances[.]" *Santa Fe*, 530 U.S at 315 (quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)). In this inquiry, the following points are salient:

—The Virginia statute's preamble fails to provide any purpose unrelated to religion, but rather speaks only of accommodating religious observances on school property;

—The legislature defeated a proposed amendment that would have deleted "pray" as one of just two specific activities identified by the statute as acceptable uses of the minute of silence;

—In amending an antecedent, permissive statute, the legislature imposed a mandatory observance, affecting some one million Virginia schoolchildren;

—The Virginia statute provides for the Commonwealth's defense of individual school systems from the inevitable lawsuits challenging the statute's constitutionality;

—The legislature contemporaneously passed a joint resolution denouncing the Supreme Court's landmark decision in *Engel v. Vitale*, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962) (declaring that state-sponsored prayer in public schools contravenes the Establishment Clause), and requesting Congress to pass a constitutional amendment permitting voluntary prayer in the classroom.

The Commonwealth contends that there are only secular purposes behind the Virginia statute, such as instilling calm in the classroom and accommodating the free exercise of religion. However, the statute's true aim is clear: to encourage students to pray.

I am struck by the pertinent comments of Senator John Edwards of Roanoke during floor debate of the Virginia statute. Senator Edwards remarked: "I went to seminary. I'm a religious person. I also respect the rights of others. . . . When we put in a bill that, in effect, requires a moment of prayer, then we are offending the First Amendment and we're offending those whose beliefs are different than ours." J.A. 180.[3] Just a few months later, in his *Santa Fe* opinion, Justice Stevens emphasized that "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Santa Fe*, 530 U.S. at 313.

B.

To effectively counter the position espoused by my friend Judge Niemeyer, I need not look beyond the pertinent and binding Supreme Court decisions—including *Wallace* and *Santa Fe*—involving transgressions of the Establishment Clause in our public schools. Sixteen years ago in *Wallace*, the Court determined that the Alabama statute at issue

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[3] Senator Edwards's remarks are offered not as proof that the Virginia statute violates the Establishment Clause, but rather because he recognized from the entirety of the circumstances—as I do, and as any objective observer should—that the real purpose of the statute is Virginia's endorsement of prayer in the Commonwealth's schools. It is not necessarily helpful to rely on the comments of individual legislators to ascertain the purpose behind the statute, because some insisted that their intent was purely neutral, while others advanced impermissible motives.

(permitting a minute of silence for "meditation or voluntary prayer" at the start of each schoolday) failed the first prong of the *Lemon* test because its object was wholly religious. *See* 472 U.S. at 56. The Court so concluded because, in relevant part, the measure's sponsor inserted into the legislative record a statement that the statute was an "effort to return voluntary prayer" to the public schools. *See id.* at 56-57. Moreover, there was an existing minute of silence statute in Alabama, without the "prayer" option, that already fully served any secular purpose. *See id.* at 59.[4]

The majority seeks to distinguish *Wallace* on the ground that while the Alabama statute had no secular purpose, the Virginia statute has at least two neutral goals: accommodating the free exercise of religion, and improving student focus and discipline. These secular goals, according to the majority, satisfy the *Lemon* test's first prong, because "a statute fails on this account [only] when 'there is *no* evidence of a legitimate, secular purpose[.]'" *Ante*, at 15a (quoting *Koenick v. Felton*, 190 F.3d 259, 265 (4th Cir. 1999)) (emphasis in original). This conclusion derives from Justice Stevens's observation in *Wallace* that "a statute that is motivated in part by a religious purpose *may* satisfy the first [*Lemon*] criterion." 472 U.S. at 56 (emphasis

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[4] While Justice O'Connor observed, in her concurring opinion in *Wallace*, that an appropriately drawn moment of silence statute could be constitutional, see 472 U.S. at 73-74 (O'Connor, J., concurring in the judgment), the Virginia statute is materially indistinguishable from the Alabama statute found invalid in *Wallace*. That is, the Virginia statute is one where "the face of the statute or its legislative history . . . clearly establishes that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined." *Id.* at 73. Indeed, Justice Stevens also recognized that "the legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Wallace*, 472 U.S. at 59.

added). Of course, this ambiguous comment also bolsters the converse argument that a statute is not necessarily saved from invalidation under the Establishment Clause merely because it serves some secular purpose. *Compare Lynch*, 465 U.S at 680 (Burger, C.J.) (recounting that "the Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations"), *with id.* at 690-91 (O'Connor, J., concurring) (maintaining that the Lemon test's first prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes").

Although I harbor serious doubts concerning the soundness of the majority's viewpoint, I find it unnecessary to engage in this debate, because it is manifest that a purported secular purpose cannot possibly satisfy the *Lemon* test's first prong if that purpose is patently insincere. *See Santa Fe*, 530 U.S at 308 (recognizing that, while "some deference" is owed to a legislature's professed secular purpose for an arguably religious policy, "it is nonetheless the duty of the courts to 'distinguish a sham secular purpose from a sincere one'") (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)) (alteration in original); *see also Stone v. Graham*, 449 U.S 39, 41, 66 L. Ed. 2d 199, 101 S Ct. 192 (1980) (invalidating a Kentucky statute requiring the posting of the Ten Commandments in public school classrooms, despite purported secular educational purposes, because "the pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature . . . and no legislative recitation of a supposed secular purpose can blind us to that fact"); *Schempp*, 374 U.S at 224 (rejecting assertion that daily readings from the King James version of the Bible served secular educational purpose, because "surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious char-

acter of the ceremony is evident from" policies allowing use of an alternative version of the Bible or opting out of the exercise). We are bound by duty to look below the surface; otherwise, a statute could run afoul of the Establishment Clause only in a *Wallace*-type situation where legislators are blatantly motivated by impermissible religious considerations. The mandate of the Establishment Clause cannot be so easily and disingenuously evaded.

Indeed, in its recent decision in *Santa Fe*, the Supreme Court had no trouble discrediting the school district's asserted purposes for its longstanding policy sanctioning student-led prayer prior to high school football games. The district advanced several secular justifications for this pregame "invocation," including fostering free expression, solemnizing the sporting event, promoting good sportsmanship and student safety, and establishing an appropriate environment for competition. *See Santa Fe*, 530 U.S. at 309. But the Court concluded, inter alia, that the district's approval of just one specific kind of message, the "invocation" (a term that connotes a religionin fused address), was not necessary to further these asserted purposes. *See id.* at 306-07, 309. Moreover, the Court reasoned that "the fact that only one student is permitted to give a content-limited message suggests that this policy does little to 'foster free expression.'" *Id.* at 309 (alteration in original). The Court's detailed examination of the policy's text in light of the school district's history of sanctioning pregame prayers led to the inevitable conclusion that this policy could not satisfy the *Lemon* test's first prong. Writing for the Court, Justice Stevens explained:

> The District . . . asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is obviously untrue: that these messages are necessary to "solem-

> nize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Id. at 315. Justice Stevens did not permit the First Amendment to be skirted with a nod and a wink, and neither would I.

C.

In urging us to uphold the constitutionality of the Virginia statute, the Commonwealth asks us to accept three asserted secular purposes: (1) "implementing constitutional guarantees of religious liberty within the public schools"; (2) "maintaining good order and discipline, affording an opportunity for introspection, and improving student focus on the educational activities of the day"; and (3) "extending the benefits of a minute of silence to public schools statewide and providing local school divisions with a defense in any lawsuit against the Act." Appellees' Br., at 40. I examine each of these purported justifications in turn.

1.

First, the Commonwealth defends its explicit references to religion and prayer in the Virginia statute as means to accommodate the free exercise of religion. The Commonwealth points to the statute's preamble, which provides:

> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division shall establish the daily observance of one minute of silence in each classroom of the division.

> Va. Code Ann. § 22.1-203. This preamble, however, is a contradiction in terms. That is, if the Commonwealth of Virginia were truly concerned about subjecting students to undue pressure to engage in or refrain from religious observances during the schoolday, why would it impose a minute of silence in such a manner that students must contemplate daily whether to pray or not? And, if the Old Dominion genuinely wishes to protect the rights of "every pupil" to the free exercise of religion, why would the statute only accommodate those students whose belief systems embrace engaging in prayer while sitting and while remaining silent?

Just as the single-student, content-limited invocation in *Santa Fe* did little to further the asserted goal of fostering free expression, the Virginia statute is exceedingly limited in its ability to facilitate the free exercise of religion. This statute seeks to accommodate only those public school students who engage in religious observances while silent, seated, and still—that is, primarily those who engage in the accepted and traditional Protestant practices. In so doing, it runs afoul of and treads upon the traditional prayer practices of, for example, Catholic, Muslim, and Jewish children.[5] In

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[5] For instance, in her affidavit, twelfth-grader Vanessa Brown of Fairfax, a Catholic, states, "I cannot practice my religion in its customs (i.e., standing, kneeling, genuflecting) without violating the law." J.A. 199. When praying, Brown either stands or kneels, concluding her prayers "by making the sign of the cross." *Id.* at 198. Similarly, third-grader Amy Cohen of McLean, a child of the Jewish faith, notes that she often prays through song. *See id.* at 203. Jordan Kupersmith, an eleventh-grader from Potomac Falls, also expresses his concerns regarding the minute of silence, reasoning that "[n]ot all religions can pray silently while being seated. Some must stand, some must kneel on a prayer rug." *Id.* at 248. A common thread linking these students with other plaintiffs who submitted affidavits is a concern over being ridiculed for not bowing their heads in silent prayer and for asserting opposition to the mandate of the Virginia statute.

these circumstances, the religious practices of such children deserve—and, under the Constitution, they are entitled to—protection from the actions of their government.

Moreover, contrary to the Commonwealth's assertions, the Virginia statute is entirely unnecessary to protect the free exercise of religion in public schools. Indeed, the Supreme Court rejected a similar free exercise argument in support of the statute in *Wallace*. *See* 472 U.S. at 57-58 n.45. There, the Court dismissed Governor George C. Wallace's contention that the Alabama minute of silence measure was "best understood as a permissible accommodation of religion[.]" *Id.* (citation omitted). The Court concluded that this assertion was based on the unsupported "theory that the free exercise of religion of some of the State's citizens was burdened before the statute was enacted." *Id.* That is, Alabama already permitted a minute of silence during which students could choose to silently pray; therefore, the State did not need to enact a statute specifying prayer as a favored option in order to accommodate the free exercise of religion. *See id.*; cf. *Edwards v. Aguillard*, 482 U.S 578, 587, 96 L. Ed. 2d 510,107 S. Ct. 2573 (1987) (discrediting the contention that a Louisiana statute requiring schools to teach creationism with evolution advanced academic freedom, because the statute did not confer "teachers a flexibility that they did not already possess[,]" as "no law prohibited Louisiana public school teachers from teaching any scientific theory").

In this instance, rather than adding a reference to "prayer" to its minute of silence statute, the Virginia legislature refused to remove it. According to the Commonwealth, an explicit reference was necessary "to guarantee religious liberty and prevent discrimination against prayer." Appellees' Br., at 44. This contention, however, like the free exercise defense asserted by Governor Wallace, is premised on the theory that the right to engage in silent prayer would somehow be burdened without inclusion of the word "pray" in the Virginia

statute. In support of this theory, the Commonwealth advances a list of recent incidents in Virginia showing "a tendency toward discrimination against religious expression in the public schools," including prohibitions on Bible club meetings and distribution of religious materials on school property. *See id.* at 10-11. However, not one of these episodes involved interference with silent prayer and, thus, these incidents fail to support the Commonwealth's theory of inevitable discrimination.

The Commonwealth's position is supported only by mere speculation that, without express reference to prayer in the Virginia statute, students would not be advised that prayer is an allowable activity during the minute of silence, or they would be admonished that prayer is an impermissible activity during this time. Such conjecture is entirely insufficient to justify the Commonwealth's purported accommodation of religious freedom; in turn, it cannot establish a sincere secular purpose for the inclusion of "pray" in the Virginia statute.[6] Because the statute is unnecessary to protect the free exercise of religion, and because it accommodates only select religious observances, it simply cannot be justified as a means to ensure the constitutional rights of Virginia schoolchildren. *Cf. Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169, 1176 (S.D. W. Va. 1985) (Hallanan, J.) (rejecting a "free exercise" justification for a West Virginia measure of the same ilk, because this rationale was unprecedented and "inherently contradictory"). Those rights are best protected by the First Amendment itself, as promulgated and ratified over two hundred years ago.

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[6] Indeed, the majority rejects as "speculative fear" the plaintiffs assertion that impressionable schoolchildren will perceive the Virginia statute as an endorsement of prayer. *See ante*, at 19a. According to Judge Niemeyer, "In the context of a facial challenge, this fear is speculative at best." *Ante*, at 18a. The plaintiffs contention regarding the impressionability of children is further discussed at Part II, *infra*.

2.

The Commonwealth asserts that the Virginia statute also serves the purpose of providing a quiet moment each morning that will allow students to engage in introspection and to focus on the day ahead, thereby fostering discipline and order in the classroom. Strikingly, no such purpose is mentioned in the statute's preamble (which speaks only of guaranteeing "the right of every pupil to the free exercise of religion") or elsewhere in the statute's text. *See* Va. Code Ann. § 22.1-203. Indeed, the preamble to the Virginia statute stands in stark contrast to the uncodified preamble to a moment of silence measure in Georgia, which was upheld by the Eleventh Circuit. *See Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). The preamble to the Georgia statute explains that it was intended to provide students "a moment of quiet reflection before plunging headlong into the day's activities[,]" as a benefit to students and society. *Id.* at 1466 (quoting Moment of Quiet Reflection in Schools Act, Act No. 770, § 1, 1994 Ga. Laws 256, 256). Moreover, unlike the text of the Virginia statute, the text of the Georgia statute makes clear that the "moment of quiet reflection . . . is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day." *Id.* (quoting Ga. Code Ann. § 20-2-1050(b) (Michie 1996)).[7]

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[7] The Georgia statute is of particular interest because, according to the Commonwealth, "[t]he court-approved guidelines for implementing the Georgia statute are the model for the guidelines issued in Virginia." Appellees' Br., at 33. Indeed, a June 13, 2000 memorandum to school officials from Virginia's Superintendent of Public Instruction adopts the Georgia statute's preamble, practically verbatim, as a statement of the General Assembly of Virginia's intent in passing its statute (though this is not the statement of purpose adopted by the Virginia legislature in the actual text of the statute). The memorandum provides:

In concluding that the Georgia statute furthered a sincere secular purpose, the Eleventh Circuit determined that: the statute's "preamble sets forth a clearly secular purpose"; that purpose "is repeated expressly in the language of the statute itself"; "the statute indicates that Georgia is not advocating the moment of quiet reflection as a time for religious activity"; and the legislative history of the statute, "although somewhat conflicting, is not inconsistent with the express statutory language articulating a clear secular purpose and disclaiming a religious purpose." *Bown*, 112 F.3d at 1469-71. By contrast, there is absolutely no mention of the

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> The General Assembly recognized that, in today's hectic society, all too few of our citizens are able to experience a moment of quiet reflection before plunging headlong into the day's activities, and that our young citizens are particularly affected. This legislation reflects the view that our young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each day. Accordingly, the new statute states the following:
>
> > In order that the right of every pupil to the free exercise of religion be guaranteed within the schools . . . .

J.A. 251 (quoting Va. Code Ann. § 22.1-203). The memorandum also counsels that a copy of the Virginia statute should be sent home with students at the beginning of each school year, and it admonishes, like the policy in *Bown*, that teachers and administrators should be cautioned "not to suggest or imply that students should or should not use that time for prayer." *Id.* at 252. After newspapers reported that the memorandum instructed school officials that they should avoid advising students that prayer was a permissible activity, Virginia's Attorney General issued a statement clarifying that students and parents were to be informed in writing at the beginning of each school year of the right to pray, and that, "if school officials believe other steps are needed to convey that information[,] . . . nothing in the Superintendent's memorandum prevents that from being done." *Id.* at 254. According to the Attorney General's statement, "It is essential that students be fully advised that they have the fundamental right to use the minute of silence for prayer if they so choose." *Id.*

Virginia legislature's second purported secular purpose—e.g., providing students a minute of valuable introspection and instilling calm in the classroom—in its statute. But there are, of course, plenty of references to prayer and religion.

Moreover, on the one hand, the Eleventh Circuit was persuaded of the Georgia statute's constitutionality because it removed an express reference to "prayer" from its predecessor statute. *See id.* at 1469 n.3 ("The deletion of the words 'prayer or meditation' and the substitution of the words 'period of quiet reflection' provides some support for the idea that the Act's purpose is secular and is not to establish a moment of prayer."). On the other hand, the Virginia legislature refused to remove the word "pray" from its statute. Indeed, that unwillingness to delete "pray" from the Virginia statute demonstrates why it is less like the Georgia statute upheld in *Bown* by the Eleventh Circuit, and more like the Alabama statute invalidated in *Wallace* by the Supreme Court. In *Wallace*, the Court determined that the addition of "or voluntary prayer" to the existing statute providing solely for a period of "meditation" indicated "that the State intended to characterize prayer as a favored practice." 472 U.S. at 60. The Court concluded that "such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id.* Here, too, it is inescapable that the Virginia legislature intended to endorse prayer as a favored practice, in violation of the Establishment Clause.[8]

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[8] This impermissible religious purpose is evident throughout the Virginia statute's text and legislative history, not just from an isolated reference to prayer. Thus, it is irrelevant to our inquiry whether use of the word "pray" in a minute of silence measure constitutes a per se violation of the Establishment Clause. *See ante*, at 25a ("The statute's use of the word 'pray,' in listing an unlimited range of mental activities that are authorized during the minute of silence, cannot by itself be a ground for finding the statute unconstitutional.").

Though the majority concludes that the Virginia statute "is designed to provide each student at the beginning of each day an opportunity to think, to meditate, to quiet emotions, to clear the mind, to focus on the day, to relax, to doze, or to pray[,]" *ante*, at 25a, only two of these activities—meditating and praying—are expressly endorsed by the Commonwealth. Moreover, while the majority is satisfied that, "because the state imposes no substantive requirement during the silence, [the statute] is not religiously coercive[,]" *id.*, I am not comforted by the Virginia statute's allowance of "choice." Simply because the Commonwealth does not explicitly require its public school students to pray does not mean that they are not being subtly coerced to do so.

3.

Finally, the Commonwealth insists that the third secular purpose of the Virginia statute was to amend an existing measure: first, to impose the mandatory—rather than permissive—observance of a minute of silence in order to "extend[ ] the benefits . . . to public schools statewide"; and, second, to authorize legal representation by the Attorney General in lawsuits challenging the statute. *See* Appellees' Br., at 40. These assertions command little consideration. That is, the compulsory nature of the statute plainly renders it even more offensive than the *Wallace* statute, which at least made the exercise optional. Moreover, the Commonwealth's provision of legal representation for the defense of local schools is a telling acknowledgment that the statute invites a constitutional challenge.

II.

Although I need not address the additional requirements of the *Lemon* test, *see supra* note 2, I am compelled to comment on the position taken by the majority in its discussion regarding the test's second prong. The majority rebuffs the plaintiffs assertion that, no matter whether the Virginia

statute's purpose is secular, its "inevitable effect . . . will be to promote prayer by creating the perception, especially from the viewpoint of young, impressionable school children, that the Commonwealth endorses prayer." *Ante*, at 18a. In doing so, Judge Niemeyer relies on the Supreme Court's recent decision in *Good News Club v. Milford Central School*, 150 L. Ed. 2d 151, 121 S Ct. 2093 (2001), for the proposition that the special impressionability of children is irrelevant in this case to determining whether the Virginia statute encroaches on the Establishment Clause. *See ante*, at 18a.

I must take issue with Judge Niemeyer's characterization of the decision in *Good News Club*. Therein, the Court concluded that a school's refusal to permit after-hours meetings on its property by a Christian children's club violated the club's free speech rights, and that this infringement was unnecessary under the Establishment Clause. In so holding, Justice Thomas pointed out that the impressionability of students would not necessarily be relevant to the Establishment Clause calculus where "the school was not actually advancing religion[.]" *Id.* In seeking to justify its position, the majority seizes upon this language. *See ante*, at 18a ("Despite language in Supreme Court precedent recognizing the impressionability of elementary school children and the greater threat of religious coercion attendant to religious displays in elementary schools, nothing the Court has said 'suggests that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue.'") (internal citations omitted). The majority's analysis begs the question because it assumes, incorrectly, that the Virginia statute does not "advance religion."[9]

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[9] Moreover, it seems to me that Justice Thomas simply recognized that "whatever significance" the Court has traditionally assigned to the impressionability of younger children in Establishment Clause cases, this

Contrary to the majority, I find ample support in the Supreme Court's decisions for the conclusion that Virginia's one million schoolchildren, some as young as kindergartners, are especially deserving of protection from the Commonwealth's unconstitutional endorsement of prayer. Indeed, in 1987, Justice Brennan explicitly stated that the Court

> has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, the public school is at once the symbol of our democracy and the most pervasive means for promoting our

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factor has never been used to invalidate the type of conduct at issue in *Good News Club*—"*private* religious conduct during nonschool hours [that] merely . . . takes place on school premises where elementary school children may be present." 121 S. Ct. at 2104 (emphasis added). Nonetheless, Justice Thomas proceeded to consider the possible misperceptions of schoolchildren with regard to after-hours religious activities on school grounds. *See id.* at 2106. In the end, he concluded that "these circumstances simply do not support the theory that small children would perceive endorsement here[,]" and that he could not say "the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Id.* Because of these particular circumstances, Justice Thomas "declined to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Id.*

> common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.

Edwards, 482 U.S. at 583-84 (internal citations, quotation marks, and alterations omitted).

III.

In Virginia, impressionable children must now engage in a minute of silence—and are encouraged to silently pray—at the start of every schoolday. This exercise is sponsored by their government and implemented by their teachers. The observance occurs in Virginia public school classrooms each morning, in a place and at a time when the presence of these schoolchildren is required.

Because this trespass on First Amendment rights is one that we should not abide, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

00-2132, CA-00-1044-A,
00-2400, CA-00-1044-A

BROWN v. GILMORE

NOTICE OF ISSUANCE OF MANDATE

August 15, 2001
MANDATE

TO: Clerk, District Court/Agency

FROM: Joy Hargett
Deputy Clerk

HEREWITH IS THE MANDATE OF THIS COURT, ISSUED THIS DATE, ON THE JUDGMENT ENTERED BY THE COURT ON 7/24/01.

[ ] Order and Certified Copy of Judgment
[x] Opinion and Certified Copy of Judgment
[ ] Order on Costs
[ ] Other
[ ] The record has been retained for use in case number

A copy of the judgment is enclosed to counsel/pro se parties.

cc: David Loren Haga
Stuart Henry Newberger
William Henry Hurd

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed July 24, 2001]

No. 00-2132, CA-00-1044-A

ED BROWN, as parent and next friend of Vanessa Brown; ROSALYNNE BROWN, as parent and next friend of Vanessa Brown; VANESSA BROWN, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; MARC J. COHEN, as parent and next friend of Amy and Michael Cohen; MICHAEL COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; AMY COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; FRANK M. FEIBELMAN, as parent and next friend of Seth Feibelman; SETH FEIBELMAN, a minor child attending Henrico County Middle School in Henrico County, Virginia; GREGORY KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; PATRICIA KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; KATHRYN ANYA KRUGLAK, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; JEFFREY M. LEPON, as parent and next friend of Jana Lepon and Ariel Lepon; CORA YAMAMOTO, as parent and next friend of Jana Lepon and Ariel Lepon; JANA LEPON, a minor child attending Longfellow Middle School in Fairfax County, Virginia; ARIEL LEPON, a minor child attending Haycock Elementary School in Fairfax County, Virginia; WAYNE GRAY, as parent and next friend of Robyn Gray; DEBORAH GRAY, as parent and next friend of Robyn Gray; ROBYN GRAY, a minor child attending White Oak Elementary School in Fairfax County, Virginia; MARK MAGRUDER, as parent and next friend of Mia MaGruder; ELLA MAGRUDER, as parent and next friend of Mia MaGruder;

MIA MAGRUDER, a minor child attending Amherst Middle School in Amherst County, Virginia; ROY KUPERSMITH, as parent and next friend of Jordan Kupersmith; ADRIANA KUPERSMITH, as parent and next friend of Jordan Kupersmith; JORDAN KUPERSMITH, a minor child attending Potomac Falls High School in Loudoun County, Virginia,

Plaintiffs-Appellants,

v.

JAMES GILMORE, The Honorable James Gilmore in his official capacity as Governor of the Commonwealth of Virginia; WILBERT BRYANT, The Honorable Wilbert Bryant in his official capacity as Virginia Secretary of Education; JO LYNNE DEMARY, in her official capacity as Virginia Superintendent of Public Instruction; VIRGINIA BOARD OF EDUCATION; VIRGINIA DEPARTMENT OF EDUCATION; DANIEL DOMENECH, in his official capacity as Division Superintendent Fairfax County Public Schools; MARK A. EDWARDS, in his official capacity as Division Superintendent Henrico County Public Schools; JOHN J. DANIELS, in his official capacity as Division Superintendent Amherst County Public Schools; THE FAIRFAX COUNTY SCHOOL BOARD; HENRICO COUNTY SCHOOL BOARD; AMHERST COUNTY SCHOOL BOARD; EDGAR B. HATRICK, in his official capacity as Division Superintendent Loudoun County Public Schools; LOUDOUN COUNTY SCHOOL BOARD,

Defendants-Appellees.

No. 00-2400, CA-00-1044-A

ED BROWN, as parent and next friend of Vanessa Brown; ROSALYNNE BROWN, as parent and next friend of Vanessa Brown; VANESSA BROWN, a minor child attending Thomas Jefferson High School for Science and Technology in

Fairfax, Virginia; MARC J. COHEN, as parent and next friend of Amy and Michael Cohen; MICHAEL COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; AMY COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; FRANK M. FEIBELMAN, as parent and next friend of Seth Feibelman; SETH FEIBELMAN, a minor child attending Henrico County Middle School in Henrico County, Virginia; GREGORY KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; PATRICIA KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; KATHRYN ANYA KRUGLAK, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; JEFFREY M. LEPON, as parent and next friend of Jana Lepon and Ariel Lepon; CORA YAMAMOTO, as parent and next friend of Jana Lepon and Ariel Lepon; JANA LEPON, a minor child attending Longfellow Middle School in Fairfax County, Virginia; ARIEL LEPON, a minor child attending Haycock Elementary School in Fairfax County, Virginia; WAYNE GRAY, as parent and next friend of Robyn Gray; DEBORAH GRAY, as parent and next friend of Robyn Gray; ROBYN GRAY, a minor child attending White Oak Elementary School in Fairfax County, Virginia; MARK MAGRUDER, as parent and next friend of Mia MaGruder; ELLA MAGRUDER, as parent and next friend of Mia MaGruder; MIA MAGRUDER, a minor child attending Amherst Middle School in Amherst County, Virginia; ROY KUPERSMITH, as parent and next friend of Jordan Kupersmith; ADRIANA KUPERSMITH, as parent and next friend of Jordan Kupersmith; JORDAN KUPERSMITH, a minor child attending Potomac Falls High School in Loudoun County, Virginia,

Plaintiffs-Appellants,

v.

JAMES GILMORE, The Honorable James Gilmore in his official capacity as Governor of the Commonwealth of Virginia; WILBERT BRYANT, The Honorable Wilbert

Bryant in his official capacity as Virginia Secretary of Education; JO LYNNE DEMARY, in her official capacity as Virginia Superintendent of Public Instruction; VIRGINIA BOARD OF EDUCATION; VIRGINIA DEPARTMENT OF EDUCATION; DANIEL DOMENECH, in his official capacity as Division Superintendent Fairfax County Public Schools; MARK A. EDWARDS, in his official capacity as Division Superintendent Henrico County Public Schools; JOHN J. DANIELS, in his official capacity as Division Superintendent Amherst County Public Schools; THE FAIRFAX COUNTY SCHOOL BOARD; HENRICO COUNTY SCHOOL BOARD; AMHERST COUNTY SCHOOL BOARD; EDGAR B. HATRICK, in his official capacity as Division Superintendent Loudoun County Public Schools; LOUDOUN COUNTY SCHOOL BOARD,

Defendants-Appellees.

Appeal from the United States
District Court for the Eastern District
of Virginia at Alexandria

JUDGEMENT

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/ Patricia S. Connor
PATRICIA S. CONNOR
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed September 5, 2000]

No. 00-2132
(CA-00-1044-A)

ED BROWN, as parent and next friend of Vanessa Brown; ROSALYNNE BROWN, as parent and next friend of Vanessa Brown; VANESSA BROWN, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; MARC J. COHEN, as parent and next friend of Amy and Michael Cohen; MICHAEL COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; AMY COHEN, a minor child attending Spring Hill School in Fairfax, Virginia; FRANK M. FEIBELMAN, as parent and next friend of Seth Feibelman; SETH FEIBELMAN, a minor child attending Henrico County Middle School in Henrico County, Virginia; GREGORY KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; PATRICIA KRUGLAK, as parent and next friend of Kathryn Anya Kruglak; KATHRYN ANYA KRUGLAK, a minor child attending Thomas Jefferson High School for Science and Technology in Fairfax, Virginia; JEFFREY M. LEPON, as parent and next friend of Jana Lepon and Aricl Lopon; CORA YAMAMOTO, as parent and next friend of Jana Lepon and Ariel Lepon; JANA LEPON, a minor child attending Longfellow Middle School in Fairfax County, Virginia; ARIEL LEPON, a minor child attending Haycock Elementary School in Fairfax County, Virginia; WAYNE GRAY, as parent and next friend of Robin Gray; DEBORAH GRAY, as parent and next friend of Robin Gray; ROBYN

GRAY, a minor child attending White Oak Elementary School in Fairfax County, Virginia; MARK MAGRUDER, as parent and next friend of Mia MaGruder; ELLA MAGRUDER, as parent and next friend of Mia MaGruder; MIA MAGRUDER, a minor child attending Amherst Middle School in Amherst County, Virginia; ROY KUPERSMITH, as parent and next friend of Jordan Kupersmith; ADRIANA KUPERSMITH, as parent and next friend of Jordan Kupersmith; JORDAN KUPERSMITH, a minor child attending Potomac Falls High School in Loudoun County, Virginia; DENIA MOLINO MALLORCA,

Plaintiffs-Appellants,

versus

JAMES GILMORE, The Honorable James Gilmore in his official capacity as Governor of the Commonwealth of Virginia; WILBERT BRYANT, The Honorable Wilbert Bryant in his official capacity as Virginia Secretary of Education; JO LYNNE DEMARY, in her official capacity as Virginia Superintendent of Public Instruction; VIRGINIA BOARD OF EDUCATION; VIRGINIA DEPARTMENT OF EDUCATION; DANIEL DOMENECH, in his official capacity as Division Superintendent Fairfax County Public Schools; MARK A. EDWARDS, in his official capacity as Division Superintendent Henrico County Public Schools; JOHN J. DANIELS, in his official capacity as Division Superintendent Amherst County Public Schools; THE FAIRFAX COUNTY SCHOOL BOARD; HENRICO COUNTY SCHOOL BOARD; AMHERST COUNTY SCHOOL BOARD; EDGAR B. HATRICK, in his official capacity as Division Superintendent Loudoun County Public Schools; LOUDOUN COUNTY SCHOOL BOARD,

Defendants-Appellees.

ORDER

Appellants have filed an emergency motion for injunction pending appeal. Appellees have filed a response in opposition. The Court denies the motion for injunction pending appeal.

Entered at the direction of Judge Luttig with the concurrence of Judge Traxler. Judge King would grant the motion.

FOR THE COURT

/s/ Patricia S. Conner
PATRICIA S. CONNER
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed Oct. 26, 2000]

Civil Action No. 00-1044-A

ED BROWN AND ROSALYNNE BROWN., *et al.*,
Plaintiffs,

v.

THE HONORABLE JAMES GILMORE, *et al.*,
Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED, Defendants' Motion for Summary Judgment is GRANTED, and this case is DISMISSED.

/s/ Claude M. Hilton
CLAUDE M. HILTON
CHIEF UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
October 26, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Filed Oct. 26, 2000]

Civil Action No. 00-1044-A

ED BROWN AND ROSALYNNE BROWN., *et al.*,
Plaintiffs,

v.

THE HONORABLE JAMES GILMORE, *et al.*,
Defendants.

MEMORANDUM OPINION

On June 22, 2000, Plaintiffs filed a complaint with this Court asserting a facial challenge to Virginia's "moment of silence" law, Va. Code § 22.1-203. Plaintiffs are nine minor students who attend public school in four of Virginia's 132 school districts.[1] Defendants are the Governor of Virginia,

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[1] Specifically, Plaintiffs are: Ed and Rosalynne Brown, parents of Vanessa Brown, a student at Thomas Jefferson High School for Science and Technology in Fairfax County; Marc J. Cohen, parent of Amy and Michael Cohen, students at Spring Hill School in Fairfax County; Frank M. Feibelman, parent of Seth Feibelman, a student at Henrico County Middle School in Henrico County; Gregory and Patricia Kruglak, parents of Kathryn Anya Kruglak, a student at Thomas Jefferson High School for Science and Technology in Fairfax County; Jeffrey M. Lepon and Cora Yamamoto, parents of Jana Lepon, a student at Longfellow Middle School in Fairfax County, and Ariel Lepon, a student at Haycock Elementary School in Fairfax County; Wayne and Deborah Gray, parents of Robyn Gray, a student at white Oak Elementary in Fairfax County; Mark and Ella Magruder, parents of Mia Magruder, a student at Amherst Middle School in Amherst County; and Roy and Adriana Kupersmith, parents of Jordan Kupersmith, a student at Potomac Falls High School in Loudoun County.

James Gilmore, the Virginia Secretary of Education, Wilbert Bryant, the Virginia Superintendent of Public Instruction, Jo Lynee DeMary, the Virginia Board of Education, the Virginia Department of Education, and the School Boards and Division Superintendents of Fairfax, Henrico, Amherst, and Loudoun Counties.[2] Plaintiffs sought a preliminary injunction to enjoin the implementation and enforcement of the law. After a hearing on August 31, 2000, this Court denied Plaintiffs' motion for preliminary injunctive relief.

Plaintiffs now move for summary judgment requesting that this Court declare the Act unconstitutional and enjoin its enforcement. Defendants also move for summary judgment contending that the Act is constitutional and both parties agree that their facial challenge can be decided on summary judgment.

For twenty-four years, Virginia has authorized its local school divisions to establish a daily minute of silence in their classrooms. *See* Va. Code § 22.1-203. Adopted in 1976, this Act was amended, signed into law, and became effective on July 1, 2000. Two changes were made in the original statute. First instead of authorizing school divisions to elect to have a minute of silence, the law now requires them to do so. Second, the Attorney General now has the responsibility for defending the Act. The amended statute provides:

> § 22.1-203. Daily Observance of one minute of Silence
>
> In order for the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to, refrain from, religious observation on school grounds, the school board of each school division

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[2] The division superintendents are: Dr. Daniel A. Domenech of Fairfax County; Dr. Mark J. Edwards of Henrico County; Dr. John J. Daniels of Amherst County; and Dr. Edgar B. Hatrick III of Loudoun County.

shall establish the daily observance of one minute of silence in each classroom of the division.

During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

The Office of the Attorney General shall intervene and shall provide legal defense to this law.[3]

The Act was amended in 2000 through the enactment of SB 209. The chief sponsor of SB 209 was Senator Warren Barry whose floor speech addressed purposes of the Bill. He made it quite clear to the General Assembly that the purpose behind the Bill was not religious. According to the Senator, religion or an attempt to re-inject religion into the school system was not the goal or any one goal for amending the

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[3] The original statute provides:

§ 22.1-203. Daily Observance of one minute of Silence

In order for the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to, refrain from, religious observation on school grounds, the school board of each school division is *authorized to* establish the daily observance of one minute of silence in each classroom of the division.

Where such one-minute period of silence is *instituted*, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

original language. He spoke about factors such as the school violence situation that occurred in Kinley, Oregon and the resulting frustrations that have arisen in the minds of legislatures as one of the primary motivators behind the amendments. By having a mandatory moment of silence Senator Barry hoped that students would take the time to reflect more on their individual actions. He went on to say that the word prayer, whose presence was not an addition to the original language of the statute, was placed there and would remain so that children who wanted to pray would not be discriminated against.

Senator Barry also indicated his hopes to generate some sort of introspection on the part of students in the Commonwealth's public schools, as part of his overall strategy to combat the escalating juvenile violence in America's public schools.[4] He acknowledged that having a moment of silence was of course not the solution to halting the increase of violence in public schools, but instead "it may just be a nibble but it's a nibble in the right direction." Statement of Sen. W. Barry, Tr. of Senate, Feb. 1, 2000.

When SB 209 reached the Floor of the House of Delegates, the previous version of the bill was replaced by a more streamlined approach, which later became law. This approach was drafted by the Attorney General and recommended to

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[4] "I looked for a word that would best describe my purpose in this Bill and going through the dictionary, I finally came up with a word: introspection. And introspection, by dictionary definition, means contemplation of one's own thoughts feelings and purpose. If I were to accomplish anything with this Bill and we were, I would hope that it would generate some introspection on the part of some students in our public schools. Young people today are not afforded the opportunity for introspection because of today's technology with boom boxes and video games and other things that occupy their time from the time they get up in the morning to the time they go to bed at night. This would provide that opportunity." Statement of Sen. W. Barry, Tr. of Senate, Feb. 1, 2000.

Delegate Robert McDonnell, the House floor manager of SB 209. The Attorney General wrote:

> One reason for the continued vitality of Virginia's 24-year old law is the obviously legitimate purpose for which it was enacted. That purpose, which is carried forward in the proposed amendment, is not to advance religion nor inhibit it. Instead, as the statute explains, the purpose is to guarantee the free exercise of religion and to guarantee that the freedom of each individual pupil [is] subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds.
>
> Using one minute of each school day for the purposes contemplated by this law would provide a moment for students to collect their thoughts, focus on the upcoming day, and exercise self-respect and discipline. In short, this legislation would contribute to quality by promoting a positive educational environment for our children.

Letter of M. Earley to R. McDonnell, Mar. 6, 2000.

Delegate McDonnell on March 6, 2000, reminded his colleagues before their vote the function of the bill, including but not limited to, such purposes as stress reduction, maintaining good order and discipline, creating student focus on the activities at hand, all of which would lead to better discipline in the classroom.

SB 209 was subsequently signed into law by Governor James S. Gilmore, III. He expressed through a *Sine Die* Statement to the General Assembly on March 10, 2000, that through their efforts in implementing this statute, a sense of calm and civility will be restored in the public schools by offering students a minute of silence. The Governor went on to express that with this peaceful minute, students are given the choice to reflect, collect their thoughts or pray and bow their heads, if they so choose.

On July 13, 2000, the Commonwealth's Superintendent of Public Instruction issued a memorandum to the superintendents of the local school divisions cautioning them that the moment of silent reflection was not intended as a religious exercise and shall not be conducted as such. It directed the local superintendents to provide an opportunity for a moment of silence on the anticipated activities of the day. The memorandum explained the General Assembly's purpose in implementing the Act as a recognition that we live in a hectic society and our young would benefit from having to pause and having an opportunity to be silent for sixty seconds. The memorandum made clear that teachers and administrators should not imply that students use the time for prayer, but rather as an opportunity to reflect on the day's activities. The Attorney General's June 14, 2000, statement went further, making it clear that the decision to pray is that of the individual students, not subject to pressure from teachers, administrators or the government.

Plaintiffs contend that the statute violates the Establishment Clause of the First Amendment and runs afoul of the Supreme Court's decision in *Wallace v. Jafree*, 472 U.S. 38 (1984). They contend that the mention of prayer in the statute is not permitted by *Wallace*.

The *Wallace* case was the first and only moment of silence case to reach the Supreme Court, the Court held, six to three, that the Alabama statute authorizing a moment of silence for "meditation or voluntary prayer" endorsed religion, lacked a secular purpose, and therefore violated the Establishment Clause. In deciding *Wallace*, the Court applied the Lemon test to determine whether the Alabama statute authorizing a one-minute moment of silence was constitutional. In determining whether the challenged statute had a secular purpose, the Supreme Court considered the legislative history, exact purpose of the statute, and the legislative intent. Following the Court's earlier decision in *Lynch v. Donnelly*,

465 U.S. 668, 690 (1984), these factors remained important in the application of the first prong of the Lemon test. The *Wallace* Court closely examined the legislative minutes prior to the passage of the statute and found an attitude of endorsing religion. In reaching its conclusion, the Court examined the words of the bill's sponsor who stated that the purpose of the act was to return voluntary prayer to public schools. The statement on the floor of the Alabama Senate expressed a direct desire to give the children in Alabama an opportunity to share in, what Senator Holmes described as, the state's and this country's spiritual heritage. He also asserted that the State of Alabama and the United States were founded by people who believe in God and that the return of voluntary prayer in the public schools would return the State of Alabama to the original position of the writers of the Constitution. Furthermore, when asked whether he had any purpose other than returning voluntary prayer to the public schools, senator Donald Holmes answered that he did not have any other purpose in mind. The Court concluded that the statute failed the first prong of the Lemon test because the sole purpose of the challenged action was sectarian, and therefore did not need to consider the second and third prongs of the analysis, as the statute was already deemed unconstitutional. Moreover, the state did not demonstrate any secular purpose for the statute.

Second, the Court reasoned that this religious purpose was substantiated by examining the statute authorizing the period of meditation or voluntary prayer with a previous statute mandating a period of silence for mediation only. The only difference between the two was the addition of the words "or voluntary prayer." *Wallace*, 472 U.S. at 60. The Court reasoned that the only explanation for the addition of the new statute was to bring prayer back to the schools. This reason was impermissible under the Establishment Clause because it indicated an intent to characterize prayer as a favored practice.

The Establishment Clause of the First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. It is applicable to the states through the Fourteenth Amendment's Due Process Clause. In assessing the facial challenge to the Commonwealth's Act, we apply the three factors of the Lemon Test, which according to Chief Justice Burger, were a "cumulative criteria developed by the Court over many years." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Court in *Lemon* held that in order for an action to be valid under the Establishment Clause, it must meet the following three factors: (I) it must have a secular legislative purpose; (ii) the primary effect of the action must neither advance nor inhibit religion; and (iii) the action must not foster an excessive governmental entanglement. A challenged statute must satisfy all three of the Lemon prongs in order to pass constitutional muster.

Lower federal and circuit courts have dealt with the constitutionality of "moment of silence" statutes with greater frequency than the Supreme Court. A number of these decisions have found "moment of silence" statutes to have a secular purpose after applying the Lemon test as specifically analyzed under *Wallace*. For example, in 1994 the Georgia State Legislature enacted the Moment of Quiet Reflection in Schools Act, an act which is similar in purpose and nature to the one at issue. The statute requires teachers in the State of Georgia to begin each school day with a brief period, not more than sixty seconds, of quiet reflection. Ga. Code Ann. § 20-2-1050(a) (1995). The Act was enacted to provide students with this silent moment before beginning a busy school day and explicitly states that the moment is not to be conducted as a religious exercise. It was challenged in *Bown v. Ginnett County School District*, where the district court found it to be constitutional under the Lemon test. 895 F. Supp. 1564, 1586 (N.D. Ga. 1995). Later the Eleventh Circuit

affirmed this finding. *Bown v. Ginnett County School District*, 112 F.3d 1464,1466 (11th Cir. 1997).

The lower federal courts have also found some "moment of silence" statutes to be unconstitutional under the Lemon test. In *Walter v. West Virginia Board of Education*, the court examined the legislative history surrounding the adoption of a "moment of silence" statute, as well as the statements of the bill's sponsors, just as the Supreme Court had in *Wallace*. 610 F. Supp. 1169 (S.D. W.Va. 1985). It held that the W. Va. Const. Art. III, § 15-a was unconstitutional because the court found that the legislative history contained statements of a House Delegate who quoted a constituents letter reading, "I believe it is time when we should welcome God back into the classrooms and not just meditation but by prayer and praise also." *Id.* at 1163. Similarly, a Tennessee statute had to be amended because "the overwhelming intent among legislators supporting the bill, including the sponsors, was to establish prayer, as a daily fixture in the public schoolrooms of Tennessee." *Beck v. McElrath*, 548 F. Supp. 1161, 1163 (M.D. Tenn. 1982).

Under the Lemon test, the Court must first inquire into the purpose of the legislature in enacting the moment of silence law in this case. *Wallace*, 472 U.S. at 55. If the statute does not have a clear secular purpose there is no need to continue with the analysis. *Id.* at 56. On the other hand, in determining whether the ordinance has a secular purpose, the Fourth Circuit in *Barghout v. Bureau of Kosher Meat*, noted that the first prong of the Lemon test is "a fairly low hurdle" and that a statute has no secular purpose "only if there is no question that the statute or activity was motivated wholly by religious considerations.[5] 66 F.3d 1337, 1345 (citing *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

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[5] Aside from the Fourth Circuit the following circuits have held that *Lynch* controls: *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 419

While Plaintiffs argue that the legislative purpose must be wholly secular in order for the statute to pass the first prong, the Supreme Court has not read the first prong of Lemon as requiring that a statute have solely secular purposes. As Justice Powell observed, the *Wallace* majority simply holds that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. 472 U.S. at 64. This notion is further strengthened by the following statement of Chief Justice Burger in *Lynch v. Donnelly* commenting that the Court "has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded that there was no question that the statute or activity was motivated wholly by religious considerations." 465 U.S. at 680.

Plaintiffs argue that religious motivations are shown by the following: (1) the statute's reference to the free exercise of religion, (2) the contemporaneous adoption of HJR 71, and (3) inclusion of the word "pray" in the list of permitted activities. However, there are significant differences between the circumstances surrounding the enactment of the Alabama moment of silence statute and the Virginia statute. The Virginia Act displays the exact opposite of what was deemed unconstitutional under *Wallace*. Virginia's stated purpose is not to advance religion.

(5th Cir. 1991) (exclusively secular purposes not required by school district) (citing *Lynch*, 465 U.S. at 681, n.6.); *Chaudhri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997)("Government's purpose need not be exclusively secular") (citing *Lynch*, 465 U.S. at 681); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369,384 (6th Cir. 1999)(citing *Lynch*, 465 U.S. at 681); *Fleischfresser v. Directors of Sch. Dist.* 200,15 F.3d 680, 688 (7th Cir.1993)("Government action is improper when there is no secular purpose . . . but to determine that there is no secular purpose, we must find that the action was motivated wholly by religious consideration.'")(quoting *Lynch*, 465 U.S. at 680); *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464, 1469 (11th Cir. 1997) (Statute's purpose need not be exclusively secular." (citing *Lynch*, 465 U.S. at 681, n.6.).

The Commonwealth has identified three secular purposes for the Act, including the 2000 amendments: (1) implementing constitutional guarantees of religious liberty within the public schools, (2) maintaining good order and discipline, affording an opportunity for introspection, and improving student focus on the educational activities of the day, and (3) extending the benefits of a minute of silence to public schools statewide while providing local school divisions with a defense in any lawsuit against the Act. Plaintiffs argue that these purposes are a sham and the real purpose of the Commonwealth is to endorse religion through the 2000 amendments. However the preamble and the Act itself state a secular purpose for the Act. The Act begins with language supporting the guarantees of religious liberty.[6] This stated purpose is a secular one. Plaintiffs argue that this preamble displays the Act's religious purpose and is merely pretextual because the free exercise of religion is already protected under the First Amendment. "The inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited." *Wallace*, 472 U.S. at 74. (O' Connor, J., concurring). Furthermore, legislative judgments about the need for a statute are "entitled to substantial deference." *Mueller v. Allen*, 463 U.S. 388 (1983). The constitutional rights regarding religious liberty are often misunderstood. This misunderstanding has led to many instances in the Commonwealth where there has been discrimination against religious expression in the public schools. This concern led the 1994 General Assembly to adopt legislation requiring the Board of Education to develop guidelines on constitutional rights and restrictions relating to

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[6] "In order for the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to, refrain from, religious observation on school grounds. . ." Va. Code § 22.1-203.

prayer and other religious expression in public schools. Va. Code. § 22.1-280.3.

Likewise, this supports the Commonwealth's concerns for leaving the word "pray" within the Act in order to make sure that the Commonwealth's schools treat prayer as a permissible option. The language in Va. Code § 22.1-203 was written and passed 24 years ago when the moment of silence law was adopted in 1976. There is nothing in the history that makes the Act's reference to the free exercise of religion or the word "pray," as a nonsecular purpose behind the Act.

According to Plaintiffs, the fact that certain statements were made and published by the media shows that the stated legislative purpose is a sham. However, this evidence is contradicted by the official testimony of the Act's sponsor, as well as other evidence about the legislative history of this Act as outlined above. "Even if some legislators were motivated by a conviction that a religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." *Bown*, 895 F. Supp. at 1575-76 (citing *Board of Educ. of westside Community Sch. v. Mergens*, 496 U.S. 226, 249 (1990)). The sponsor of SB 209 was emphatic that his purpose was not to try and re-inject prayer. There is an important difference between the motive and purposes of individual legislators and institutional legislative purpose.

Second, the legislative history shows that guaranteeing religious liberty, which includes preventing discrimination against prayer, and promoting pedagogical benefits statewide motivated the 2000 amendments. The chief sponsor of the amendments, Senator Barry, and the House floor manager, Delegate McDonnell, both explained the bill in these terms, as outlined above. Additionally, the guidelines issued by the Board of Education in 1995, issued before the 2000 amendments, through administrative interpretation also

reflect the secular purposes of the Act. Additionally, the Attorney General's interpretation of the Act as one which is to "provide a moment for students to collect their thoughts, focus on the upcoming day, and exercise self respect and discipline . . . this legislation would contribute to quality by promoting a positive educational environment for our children," reflects the same secular reasoning. Letter of M. Earley to R. McDonnell, Mar. 6, 2000.

Under the second prong of the *Lemon* test, a court is required to determine whether the primary effect of the Commonwealth's Daily Observance of one minute of Silence advances or inhibits religion. In this case, the test becomes whether the effect of the Act is to advance religion by encouraging prayer or conveying a message that encourages prayer in public schools.[7]

First the Act is not associated with a religious exercise. The Commonwealth of Virginia for the past 24 years in at least 20 local school districts has invoked the same moment of silence, which is now mandatory, in their classrooms. There is no indication that any of them used the period as a government prayer exercise. Furthermore, in 1994 the Commonwealth's General Assembly adopted guidelines relating to religious expression in public schools. The Guidelines communicated to the public schools that they may provide students with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. The Guidelines also

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[7] In many cases the Supreme Court has held that the presence of the word pray or reference to prayer does not have the effect of encouraging or endorsing prayer. *See Donnelly v. Lynch*, 465 U.S. at 683. "Such a view would necessitate the abolition of the National Day of Prayer, 36 U.S.C. § 169h, the elimination of 'under God' from our pledge of allegiance, the removal of "in God we trust" from our currency and the removal of many other references and calls to 'God' and 'prayer' in our state and national affairs and laws." *Bown v. Gwinnett County School District*, 895 F. Supp. at 1577-78 (citations omitted).

outlined additional secular objectives that a brief minute of silence may fulfill such as the maintenance of discipline and order. It especially went into detail on the role of the teacher in regards to prayer. The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. Teachers were further advised by the Guidelines that they should also not use the time to pray aloud in front of other students, nor permit any other student, or group of students to pray aloud.

Secondly, the Act and the facts of this case show that Virginia has done nothing intended to convey a message that students should use the moment to pray. The Act instructs that students should use the moment to be silent. It does not prohibit or convey any messages of prohibiting a student to sit silently and pray. It does not say if one does not pray then they may meditate, reflect or simply be silent. The momentary silence neither advances nor inhibits religion. Students may think as they wish-and this thinking can be purely religious in nature or purely secular in nature. All that is required is that they sit silently. Nothing and no one is favored under the Act.

It is important to note that like the Alabama statute in *Wallace*, the Georgia statute in *Bown* was an amendment to a prior statute and was identical to the statute it replaced, aside from the addition of a subsection. Both added the recognition of prayer to their moment of silence statutes, language that was absent before. But unlike the addition of the statute in *Wallace*, the addition of subsection in *Bown* was not found to demonstrate a desire to characterize prayer as a favored practice by the Eleventh Circuit. Not only did the Commonwealth not add the word prayer to the original statute, but similar to the statute in *Bown*, the Virginia statute does nothing to characterize prayer as a favored practice in its implementation or practice.

Under the third *Lemon* prong, the statute must not foster an "excessive entanglement" in religion. *Lemon*, 403 U.S. at

612-13 (1971). Acting pursuant to Va. Code § 22.1-280.3, the State Board of Education has developed guidelines to promote religious neutrality. Plaintiffs believe these guidelines are evidence of entanglement. However, teachers and administrators are to simply enforce a moment of silence. The Guidelines caution teachers and administrators not to suggest or imply that students should or should not use that time for prayer. This instruction given by the State Superintendent not only avoids entanglement, but instead, fosters neutrality.

In *Bown*, the Eleventh Circuit rejected an "excessive entanglement" argument as to Georgia's "moment of silence" statute, saying:

> The fact that a teacher must stop a student who prays audibly or otherwise makes noise during the moment of quiet reflection does not result in excessive government entanglement with religion. There are many times during any given school day when teachers tell their students to be quiet and when audible activity of any kind is not permitted. The fact that particular period of silence is mandated statewide does not create entanglement problems.

Bown, 112 F.3d at 1474.

The Court finds that the Commonwealth's Daily Observance of One Minute of Silence Act is constitutional, the Act was enacted for a secular purpose, does not advance or inhibit religion, nor is there excessive entanglement with religion.

An appropriate Order shall issue.

/s/ Claude M. Hilton
CLAUDE M. HILTON
CHIEF UNITED STATES
DISTRICT JUDGE

Alexandria, Virginia
October 26, 2000

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

[Aug. 31, 2000]

Case No. 00-1044-A

ED BROWN and ROSALYNNE BROWN,
as parents and next friend of
VANESSA BROWN, et al.,
Plaintiffs,

v.

THE HONORABLE JAMES GILMORE, *et al.*,
Defendants.

ORDER

This matter comes before the Court on Plaintiff's Motion for Preliminary Injunction. For the reasons stated from the bench, it is hereby

ORDERED that Plaintiff's Motion for Preliminary Injunction is DENIED.

/s/ Claude M. Hilton
CLAUDE M. HILTON
CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 31, 2000

APPENDIX F

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under

any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX G

VIRGINIA ACTS OF ASSEMBLY 2000 SESSION

REENROLLED

CHAPTER 1022

An Act to amend and reenact § 22.1-203 of the Code of Virginia, relating to one minute of silence in public schools.

[S 209]

Approved April 19, 2000

Be it enacted by the General Assembly of Virginia:

1. That § 22.1-203 of the Code of Virginia is amended and reenacted as follows:

§ 22.1-203. Daily observance of one minute of silence.

In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division ~~is authorized to~~ *shall* establish the daily observance of one minute of silence in each classroom of the division.

~~Where~~ *During* such one-minute period of silence ~~is instituted~~, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.

The Office of the Attorney General shall intervene and shall provide legal defense of this law.

APPENDIX H

2000 SESSION

ENROLLED

HOUSE JOINT RESOLUTION NO. 71

Memorializing the Congress of the United States to propose an amendment to the Constitution of the United States to allow for voluntary school prayer.

Agreed to by the House of Delegates, February 15, 2000
Agreed to by the Senate, March 8, 2000

WHEREAS, the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection with the First Amendment of the Constitution of the United States; and

WHEREAS, statements of belief in a Supreme Power and the virtue of seeking strength and protection from that Power are prevalent throughout our national history; and

WHEREAS, today there are numerous signs of harmonious church/state coexistence, including organized prayer at every Congressional session, the use of the Bible while administering the oath of office, and the imprinting of "In God we trust" on the national currency; and

WHEREAS, prayer in public schools existed for nearly 200 years before the United States Supreme Court ruled in *Engel v. Vitale* that a government-composed nondenominational "Regents" prayer recited by students was unconstitutional as a violation of the establishment of the religion clause of the First Amendment; and

WHEREAS, this decision has severely constrained the exercise of religious freedom guaranteed by the First Amendment; and

WHEREAS, in the aftermath of the recent tragic events at Columbine High School in Littleton, Colorado and Westside

Middle School in Jonesboro, Arkansas, many believe that providing for school prayer would help to prevent these incomprehensible acts of violence from recurring at other schools; and

WHEREAS, several resolutions have been introduced during the 106th Congress, proposing an amendment to the Constitution of the United States to allow for individual or group prayer in public schools and other public institutions; and

WHEREAS, the proposed amendments would not prescribe the content of the prayer, endorse one religion over another, or require any person to participate in prayer; and

WHEREAS, voluntary prayer is a beneficial practice that provides the opportunity for free expression of religion and rebuilding a moral emphasis needed in a country troubled by outbreaks of unprecedented school violence; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Congress of the United States be urged to propose an amendment to the Constitution of the United States to allow for voluntary school prayer; and, be it

RESOLVED FURTHER, That the Clerk of the House of Delegates transmit copies of this resolution to the Speaker of the House of Representatives, the President of the United States Senate, and the members of the Virginia Congressional Delegation in order that they may be apprised of the sense of the General Assembly of Virginia in this matter.

Supreme Court, U.S.
FILED
SEP 28 2001
OFFICE OF THE CLERK

(2)

No. 01-384

In The

Supreme Court of the United States

ED BROWN, *et al.*,

Petitioners,

v.

JAMES S. GILMORE, III, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), the Court held that an Alabama minute of silence law was invalid because it "was not motivated by any clearly secular purpose – indeed, the statute had no secular purpose." Does the holding in *Wallace* require invalidation of Virginia's minute of silence law, which has a different text, different legislative history and different record of implementation?

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is filed by the Attorney General of Virginia on behalf of all respondents (collectively, "the Commonwealth") in defense of the Virginia minute of silence statute, Va. Code § 22.1-203 ("the Act").

INTRODUCTION

For a quarter century, Virginia law has authorized local school divisions to establish a daily minute of silence in their classrooms. In 2000, the law was amended in two ways. First, instead of *authorizing* school divisions to have a minute of silence, the law now *requires* them to do so. Second, Virginia's Attorney General now has responsibility for defending the law. No other changes were made.

The Act does not require students to do anything or say anything or hear anything. It does not require them to make any gesture or acknowledgment. It only requires them to stay in their seats, to remain silent and not to distract their classmates. This is the same rule that governs students everywhere for most of the school day. The one difference is this: just as the students must remain silent, so must the teacher. For one minute – 60 seconds – nobody will say anything. The students will be left to themselves. If they wish, they may meditate, reflect or pray silently. Or, they may read or look out the window. They may do anything they want, or nothing at all. The only requirement is that they must stay seated and silent and not distract anyone else. This is not a lot to ask, and it is not unconstitutional. There is nothing to fear from a classroom of silent, thoughtful children.

STATEMENT OF THE CASE

There is nothing unusual about the Act. The Virginia law is one of *twenty-five* minute of silence statutes identified by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. 38,

70, 71, n.1 (1985) (O'Connor, J., concurring in judgment) (citing Va. Code § 22.1-203). As she noted, the "typical" statute allows students to "meditate, pray or reflect on the activities of the day." *Id.* at 70-71. All nine Justices in *Wallace* strongly indicated that such statutes are constitutional so long as they have a secular legislative purpose.[1]

As amended in 2000, the Act has *three* secular legislative purposes: (1) implementing constitutional guarantees of religious liberty in public schools; (2) advancing pedagogical goals, *e.g.*, good order and discipline, an opportunity for introspection, and improved student focus on the day's educational activities; and (3) extending benefits of a minute of silence statewide while providing a defense to any lawsuit against it. In the context of an Establishment Clause challenge, this Court has approved a three-part inquiry for determining the purposes that motivated legislation. A secular purpose may be shown by "[1] the statute on its face, [2] its legislative history, or [3] its interpretation by a responsible administrative agency." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). As shown by the following review of the evidence, each of these areas of inquiry confirms the secular purposes of the Act.[2]

---

[1] *See Wallace*, 472 U.S. at 56, 59 (Stevens, J., majority opinion); *Id.* at 66 (Powell, J., concurring); *Id.* at 76, 84 (O'Connor, J., concurring in judgment); and *Id.* at 84 (Burger, Ch. J., dissenting); *Id.* at 90 (White, J., dissenting); *Id.* at 91 (Rehnquist, J., dissenting).

[2] While the factual review is set forth largely in chronological order, many paragraphs relate directly to the three areas of inquiry prescribed by *Edwards*. For the face of the statute, see ¶¶ 1 and 2; for legislative history, see ¶¶ 1, 2, 10, 11, 12, 13, 14; and for agency interpretation, see ¶¶ 6, 15 and 16. For evidence of real world conditions corroborating the genuineness of the asserted secular purposes, see ¶¶ 3, 4, 5, 7, 8 and 9.

The Act Has a Successful Record.

1. Origin and Text: Virginia enacted its minute of silence law in 1976. *See* 1976 Va. Acts, ch. 103. Until 2000, the Act authorized – but did not require – local school divisions to establish a minute of silence. Here is the text, showing changes made by the 2000 amendment:

> **§ 22.1-203. Daily observance of one minute of silence.**
>
> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division ~~is authorized to~~ *shall* establish the daily observance of one minute of silence in each classroom of the division.
>
> ~~Where~~ *During* such one-minute period of silence ~~is instituted~~, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.
>
> *The Office of the Attorney General shall intervene and shall provide legal defense of this law.*

2000 Va. Acts, ch. 1022. (Italics show additions; strikethroughs show deletions.)

2. Petitioners' Faulty Discussion: Petitioners repeatedly delete the term "any" from the statutory phrase "any other silent activity," replacing it with ellipsis and thus minimizing the scope of permitted activities. Pet. at (i) and 3. Petitioners also suggest the legislature showed doubts about the law's constitutionality

because it provided for a legal defense through the Attorney General. Pet. 4. This is a *non sequitur.* The legislature simply recognized that some announced opponent of the Act – such as the ACLU – would likely bring a costly but misguided lawsuit. *See* letter of M. Earley to R. McDonnell, Mar. 6, 2000, J.A. 345;[3] Senate Transcript, Feb. 1, 2000, J.A. 338-39. This petition bears out that prediction.

3. The Act Has Worked Well: Evidence about how the Act has worked was provided by the State Superintendent of Public Instruction, Dr. JoLynne DeMary. She testified that, between 1976 and 2000, at least 20 local school divisions chose to establish a minute of silence. J.A. 400.[4] There is no evidence anyone used it as a government prayer exercise. The State Superintendent's survey of school principals did not reveal any peer-on-peer harassment or other problems. Fourth Cir. Op., Pet. 5a. Students confirmed that the minute of silence "worked well and has not caused anyone a problem." J.A. 438, 440.

4. Acknowledgement by Petitioners: Petitioners agreed the Act has pedagogical benefits, telling the district court: "[I]t's a good thing for children to start the day with some reflection. It is probably a very good thing. . . . [I]t would help . . . every . . . child to do that." Fourth Cir. Op., Pet. 17a, n.5.

5. Discipline and Focus Improved: As the State Superintendent noted, students often arrive at school in an emotional state not conducive to discipline or a focus on learning. She said "[a] minute of silence works as a good transition, enabling students to pause, settle down, and focus on the day ahead." It is "a good classroom management tool and makes for a better school day." J.A.

---

[3] Where possible this brief will cite the opinion of the court of appeals (Pet. 1a-25a), or opinion of the district court (Pet. 53a-68a). Where necessary, the brief will cite the joint appendix used in the court of appeals.

[4] Petitioners incorrectly report "fewer than 20." Pet. 3.

401.[5] A minute of silence was helpful even before the events of September 11, and is likely to be even more so in light of the present national crisis.

6. Official Guidelines on the Act: In 1994, the General Assembly required the State Board of Education to develop "guidelines on constitutional rights and restrictions relating to prayer and other religious expression in the public schools . . . " Va. Code § 22.1-280.3. The Board included guidelines about the Act in terms that further document its secular purpose:

> Public schools may provide students . . . with a minute of silence to collect themselves and put their upcoming tasks in meaningful perspective for the individual student. A brief minute of silence may also fulfill other secular objectives, including maintenance of discipline.
>
> * * *
>
> The teacher may not indicate his or her views on whether students should use the time to pray or not to pray. The teacher should also not use the time to pray aloud in front of other students, nor permit any other student, or group of students, to pray aloud.

Fourth Cir. Op., Pet. 5a.

Discrimination against Religious Expression.

7. Misunderstanding the Constitution: Public school administrators and teachers often have the misperception that student religious expression is unconstitutional or may be prohibited at their discretion.

a. The State Superintendent testified that:

> [T]eachers, principals and other school administrators often believe (i) that the separation of

---

[5] On this point and many others, the testimony of Dr. DeMary was corroborated by the testimony of Dr. William C. Bosher, Jr., a former State Superintendent. J.A. 411-413.

> church and state prevents them from allowing students to engage in various forms of religious expression in the public schools or (ii) that they must restrict such expression in order to avoid the risk of time-consuming and expensive lawsuits.

J.A. 402.

b. Jay Alan Sekulow, Esq., a nationally-known expert on religious discrimination, gave this opinion:

> [T]here is a widespread perception among public school administrators and teachers – including those in Virginia – that religious expression and the free exercise of religion by students in the public schools is constitutionally impermissible or is subject to prohibition at the discretion of school authorities.

J.A. 417.

c. When considering the Equal Access Act (20 U.S.C. §§ 4071-4074), Congress reported testimony about widespread religious discrimination in public schools. *See* Excerpts, "Equal Access: A First Amendment Question," Hearings Before Committee on Judiciary, U.S. Senate, 98th Congress, 1st Sess. S. 815 and S. 1059. J.A. 420-24.

d. President Bill Clinton also recognized the problem of religious discrimination:

> [S]ome students in America have been prohibited from reading the Bible silently in study hall. . . . Some students have been prevented even from saying grace before lunch.
>
> * * *
>
> Some school officials and teachers and parents believe that the Constitution forbids any religious expression at all in public schools. That is wrong.

"Remarks by the President on Religious Liberty in America," Vienna, Virginia, July 12, 1995, J.A. 393.

8. Incidents in Virginia: Virginia is not immune from this discrimination. "[C]onstitutional rights regarding religious liberty are often misunderstood. This misunderstanding has led to many instances in the Commonwealth where there has been discrimination against religious expression in the public schools." Dist. Ct. Op., Pet. 64a; *See* Sekulow, J.A. 417-18 (listing examples).

9. Avoiding Misinformation: The State Superintendent testified that "enactment of a minute of silence statute, without making specific reference to prayer as a permissible option, would likely lead to situations in which (i) some students would not be advised that prayer is a permissible option under the statute, and (ii) some students would actually be advised that prayer is not a permissible option." J.A. 403.

The 2000 Amendment Was Motivated by Secular Purposes.

10. Statement by Chief Sponsor: The Act was amended by SB 209, whose chief sponsor was Senator Warren E. Barry. His floor speech reminded his colleagues of the secular purposes of the bill:

> *[T]he purpose of the Bill [as] has been stated and restated is not a religious crusade. It's not to try and re-inject prayer into the public school system.* The primary thing was out of the frustrations that many of us have felt based on the violence in some of our schools, such as Columbine. . . .
>
> [W]e're not putting prayer on a higher pedestal or a lower pedestal than meditate and reflect. But if students would just spend one minute to reflect on who they are, what they're doing and where they're going. *The word prayer in there was put in there so prayer would not be discriminated against.*

Senate Transcript, Jan. 31, 2000, Fourth Cir. Op., Pet. 7a (emphasis added).[6]

> [I]ntrospection, by dictionary definition, means contemplation of one's own thoughts, feelings and purpose. *[I]f I were to accomplish anything with this Bill . . . I would hope that it would generate some introspection on the part of some students in our public schools.* Young people today are not afforded the opportunity for introspection because of today's technology . . . and other things that occupy their time from the time they get up in the morning to the time they go to bed at night. This would provide that opportunity.

Senate Transcript, Feb. 1, 2000, Dist. Ct. Op., Pet. 57a (emphasis added).

11. Petitioners Misstate Defeated Amendment: Petitioners say the General Assembly "rejected a proposed amendment to the bill that would have removed the specific reference to prayer as *one of two* stated silent activities in which students may engage." Pet. 4 (emphasis added). They misstate the facts. When Senator Edward Houck offered his floor amendment, the bill listed "meditation, prayer and reflection." J.A. 330. His amendment proposed striking *all three* activities. It was in opposing *this* amendment that one of the bill's many co-sponsors said students "simply will be quiet with no purpose." The co-sponsor also noted that, even without the proposed deletion, the minute of silence was non-sectarian. Fourth Cir. Op., Pet. 7a. Senator Houck agreed the legislation was "pure in terms of [its] intent." *Id.*[7]

---

[6] Unlike the *Congressional Record*, which sometimes records speeches that no one gave – or that were given to nearly empty chambers – the speeches here were transcribed from video tapes of actual proceedings, and were delivered to chambers that were full or nearly so.

[7] In the proceedings below, petitioners relied on unsworn hearsay contained in newspaper clippings and alleged to reflect

12. Drafting by Attorney General: When SB 209 reached the House of Delegates, the bill took a more streamlined approach.[8] This approach, which became law, was drafted by the Virginia Attorney General, who wrote:

> [A]s the statute explains, the purpose is to guarantee "the free exercise of religion" and to guarantee "that the freedom of each individual pupil [is] subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds."
>
> * * *
>
> Using one minute of each school day for the purposes contemplated by this law would provide a moment for students to collect their thoughts, focus on the upcoming day, and exercise self-respect and discipline. In short, this legislation would contribute to quality by promoting a positive educational environment for our children.

Letter of M. Earley to R. McDonnell, Mar. 6, 2000, Dist. Ct. Op., Pet. 58a.[9]

---

statements by individual legislators. Such materials are inadmissible and the Commonwealth duly noted its objection. While petitioners appear to have abandoned reliance on such materials, the Commonwealth preserves its objection if such improper materials resurface. *See* Fed. R. Civ. Pro. 56(e).

[8] Petitioners are again mistaken when they say the "General Assembly approved the minute of silence law in the form in which it was introduced." Pet. 3.

[9] This Court has said that "deference should be accorded to [federal] Attorney General's construction of [federal statute], especially in light of the extensive role played by the Attorney General in drafting the statute and explaining its operation to Congress." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 179 n.29 (1985). The same deference should be afforded to Virginia's Attorney General in his interpretation of the state statute he drafted and explained to the General Assembly.

13. Floor Statement by House Manager: Speaking before the vote, the House manager of SB 209, Delegate Robert F. McDonnell explained that the bill was based on "sound public policy" and the secular purposes of "maintaining good order and discipline, creating student focus on the activities at hand and assisting the teachers in beginning the day with a period of calm which would lead to better discipline in the classroom." House Transcript, Mar. 6, 2000, Fourth Cir. Op., Pet. 8a. Relying on both expertise and experience, he added "[m]any of the experts certainly would agree and . . . it has borne out in the localities that have implemented it, that this certainly also helps not only with the *focus* but also perhaps with *stress reduction* in having a period of concentrated silence as they begin the school day." *Id.* (emphasis added).

14. Statement by Governor: SB 209 was signed into law by Governor James S. Gilmore, III, who also recognized the bill's secular purposes, saying it would "restore a *sense of calm and civility* in public schools by offering students a peaceful minute each day to reflect upon their studies, to collect their thoughts, or, if they so choose, to bow their heads and pray." *Sine Die* Statement to General Assembly, Fourth Cir. Op., Pet. 8a (emphasis added). Petitioners misstate what the Governor said. They quote only his last five words. Pet. 4, 11-12.

The Amended Act Is Being Implemented Neutrally.

15. Statement by State Superintendent: In June 2000, the State Superintendent sent local school divisions a memorandum providing guidance on the amended Act. She said, "[This] legislation reflects the view that our young, and society as a whole, would be well served if students were afforded a moment of quiet reflection at the beginning of each day." Fourth Cir. Op., Pet. 9a. The memorandum also suggested that teachers introduce the minute by saying, "As we begin another day, let us pause for a minute of silence." *Id.* She also told local school

divisions that they should "caution teachers and administrators not to suggest or imply that students should or should not use that time for prayer. . . . *This time is not intended to be and shall not be conducted as a religious service or exercise, but considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.*" J.A. 361 (emphasis added).

16. Statement by Attorney General: In June 2000, the Virginia Attorney General also underscored the need for religious neutrality. He said, "The decision whether to pray must be the decision of the student, not the decision of teachers or administrators, and not subject to government pressure." Statement of M. Earley, June 14, 2000, J.A. 362. There is no evidence that the Act is being implemented in violation of the guidance from the State Superintendent and Attorney General.

REASONS FOR DENYING THE WRIT

Summary

Petitioners say no secular purpose can be found here because none was found in *Wallace*. But *Wallace* did not hold – nor even hint – that minute of silence statutes are *per se* unconstitutional. Indeed, this Court expressly *rejected* that notion. The decision in *Wallace* was fact-specific. It was driven by Alabama's concession – indeed, its boast – that the "sole purpose" of its law was "to encourage a religious activity." *Id.* at 41, 57. The facts here are different. The result must likewise be different.

Petitioners say that, having struck the Alabama law, this Court will create a "constitutional anomaly" if it lets the Virginia law stand. Pet. 18. Such rhetoric is based on the erroneous assumption that the Alabama and Virginia statutes are identical. They are not. They have different texts, different legislative histories and different records of implementation. In short, they have different purposes, and that difference compels different results.

Finally, petitioners say that more guidance is needed on how to assess legislative purpose. They make such a

claim because, under the guidance given in *Wallace*, they clearly lose. Their effort to redefine the first prong of the *Lemon* test goes beyond their question presented, lacks support in this Court's jurisprudence, and, in any event, cannot overcome the strong evidence of secular purposes presented by the Commonwealth.

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH *WALLACE v. JAFFREE*.

> ***"The factual record of the case before us stands in stark contrast to the one presented to the Supreme Court in Wallace."***
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> Fourth Cir. Op., Pet. 23a.

The petition does not seek to resolve a conflict among the circuits, nor does it otherwise offer this Court an opportunity to address important but unresolved questions of federal law. As shown by its single question presented, the petition is based solely on the theory that the decision by the court of appeals conflicts with *Wallace*. Petitioners are mistaken. Application of *Wallace* principles to the distinct facts of this case supports – indeed, compels – the decision reached below.

1. *Wallace*: A Challenge to *Everson*.

The history of *Wallace* is important, and it bears repeating. In *Wallace*, Alabama used a minute of silence statute as a test case for challenging *Everson v. Board of Educ.*, 330 U.S. 1 (1947), which held that the Establishment Clause applies to the States. Leading up to *Wallace*, Alabama passed three laws: (1) a 1978 statute (§ 16-1-20) requiring a minute of silence "for meditation" in public elementary schools; (2) a 1981 statute (§ 16-1-20.1) authorizing a minute of silence "for meditation or voluntary prayer" in all public schools; and (3) a 1982 statute (§ 16-1-20.2) authorizing public school teachers to lead students in prayer, including a prayer written by the Alabama legislature. *Wallace*, 472 U.S. at 40. All three statutes

were challenged in the same lawsuit. At the preliminary injunction stage, the district court found the first statute to be unobjectionable, but enjoined the other two because the sole purpose of each was "to encourage a religious activity." *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982); *see also Wallace*, 472 U.S. at 41.

After trial on the merits, the district court did not change its interpretation of legislative purpose, but took it upon itself to overturn *Everson*, as Alabama had sought. Remarkably, the district court declared that "the United States Supreme Court has erred" and that "the establishment clause . . . does not prohibit the state from establishing a religion. . . . " *Jaffree v. Bd. of Sch. Comm'rs of Mobile County*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983); *see also Wallace*, 472 U.S. at 41.

Obviously, such a result could not stand. On appeal, the Eleventh Circuit reaffirmed that States are subject to the Establishment Clause and ruled that the two statutes originally enjoined by the district court – the 1981 minute of silence statute and the 1982 teacher prayer statute – violated that constitutional provision.[10] *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983). The Eleventh Circuit's decision striking down the teacher prayer was affirmed summarily. *Wallace v. Jaffree*, 466 U.S. 924 (1984).

Granting *certiorari* on the 1981 minute of silence law, this Court predictably reiterated that the Establishment Clause applies to the States, and that lower courts must adhere to Supreme Court precedent. *Wallace*, 472 U.S. at 41-55. Reaffirming the *Lemon* test, the Court again made it plain that a statute with a *dual* legislative purpose – part secular and part religious – would *pass* the first prong, but that "a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion." *Wallace*, 472

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[10] The challenge to the original, 1978 minute of silence statute was abandoned. *See Wallace*, 472 U.S. at 40. Thus, unlike the results petitioners seek here, Alabama still had a minute of silence statute even after the decision in *Wallace*.

U.S. at 56 (emphasis added, citations omitted). With this standard in hand, the Court turned to the Alabama statute and struck it down on the grounds that "the enactment of [the 1981 law] was not motivated by *any* clearly secular purpose – indeed, the statute had *no* secular purpose." *Id.* at 56 (emphasis added). In reaching this result, the Court relied upon facts having no counterpart here:

a. In Alabama, "[t]he sponsor . . . inserted into the legislative record – apparently without dissent – a statement indicating that the legislation was an 'effort to return voluntary prayer' to the public schools." *Id.* at 56-57. When asked at trial whether he had any other purpose for the legislation, he proclaimed, "No, I did not have no other purpose in mind." *Id.* at 57. In stark contrast, the chief sponsor of the Virginia law made it clear to his colleagues that "the purpose of the Bill . . . is *not* a religious crusade. It's *not* to try and re-inject prayer into the public school system." Fourth Cir. Op., Pet. 7a (emphasis added.)[11]

b. As part of its anti-*Everson* strategy, Alabama relied at trial on the sponsor's bold assertion of a religious purpose, and "did not present evidence of *any* secular purpose." 472 U.S. at 57 (emphasis added). Indeed, Governor Fob James went so far as to tell the district court that it had "no jurisdiction because prayer flows from the Almighty." *Jaffree*, 544 F. Supp. at 729. Virginia has shown no contempt for the Establishment

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[11] Petitioners try to denigrate the significance of the sponsor's pre-enactment floor speech. In doing so, they misread Justice O'Connor's statement in *Wallace* that "little, if any weight [should be given] to *this* sort of evidence." Pet. 18, *quoting Wallace*, 472 U.S. at 77 (O'Connor, J., concurring) (emphasis added). Petitioners fail to notice that the word "this" refers to "testimony elicited from [the sponsor] during a [post-enactment] preliminary injunction hearing." *Id.* It does not refer to statements made by the chief sponsor during the legislative process to influence the votes of others.

Clause, and has defended the Act with strong evidence of its secular purposes. *See supra* at 3-11.

c. Between the trial and argument before this Court, a change in Alabama governors brought a change in litigation strategy. Unlike his predecessor, Governor George Wallace argued that the reference to "prayer" in the 1981 law was "a permissible accommodation of religion." 472 U.S. at 56-57, n.45. Such a belated discovery of a secular purpose was too contrived to be credible. While the new rationale was rejected, this Court did not say that such accommodation was invalid *per se*. *Id.*

In Virginia, the accommodation rationale is nothing new; it has been part of the statutory text since the original law was enacted in 1976. And, unlike Alabama, Virginia has shown that "constitutional rights regarding religious liberty are often misunderstood" and that our state has experienced "many instances" of "discrimination against religious expression in the public schools." Dist. Ct. Op., Pet. 64a. Moreover, Virginia seeks to accommodate not just prayer, but also non-religious forms of preparing oneself for the day ahead; and, unlike Alabama, it has only one statute by which to do so.[12]

d. When Alabama passed its 1981 minute of silence statute, its 1978 law was still on the books. The earlier law "already protected" what the Court said was "every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." 472 U.S. at 59. Under these facts, the Court emphasized that

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[12] Petitioners complain that a minute of silence does not accommodate those prayer styles that cannot be performed while seated and silent and making no distracting display. Pet. 9, n.2. The same is true of *all* minute of silence laws, yet *Wallace* does not say that such laws are invalid *per se*. Moreover, none of petitioners has testified that his or her religion *precludes* silent, seated, non-distracting prayer.

Alabama did not identify any secular purpose not fully served by the earlier law. *Id.*[13]

By contrast, Virginia has only one minute of silence statute, and there were obvious secular purposes for changing that statute in 2000. Under the local option provision of the original statute, many local divisions were not affording their students a minute of silence. For these students, the "right to engage in voluntary prayer during an appropriate moment of silence" was not being protected. They were likewise being denied the other, pedagogical benefits of a minute of silence. The 2000 amendment solved these problems.

e. Alabama's implementation of its "minute of silence" was accompanied by numerous instances of teachers leading students in vocal prayer. *See Wallace*, 472 U.S. at 44, 45. No similar facts are present here. Instead, Virginia's administrators have a record of making sure that the minute of silence is not conducted as a government prayer exercise. *See supra* at 4, 5, 10 and 11.

In sum, the *Wallace* Court was faced with a trial record in which Alabama insisted (1) that the Establishment Clause does not apply to the States, and (2) that the 1981 law had *only* a religious purpose. Understandably, this Court felt it had no choice but to strike down the statute. By contrast, Virginia does not seek to flout the Establishment Clause, and there is compelling evidence that its law does have secular purposes. *See supra* at 3-11. In fact, its purposes are wholly secular. The unusual circumstances that compelled the result in *Wallace* have no counterpart here. "Indeed, the Supreme Court went

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[13] It was in this specific context that the Court found Alabama's "addition" of the word "prayer" to be motivated by a religious purpose. Contrary to petitioners' assertion, the Court never said that mere "inclusion" of the word is problematic. Pet. 7. On the contrary, a majority of the *Wallace* Court made it plain that there is no *per se* rule against the word "prayer" in a minute of silence statute, and that such statutes should pass muster so long as they have a secular purpose. *See infra* at 21-22.

out of its way to distinguish that case from the one now before us." Fourth Cir. Op., Pet. 24a.

2. This Case Is Too Fact-Specific to Merit Certiorari.

By framing their single "question presented" in terms that rely exclusively on *Wallace*, petitioners have defined their case so narrowly as to make it an inappropriate vehicle for further development of this Court's jurisprudence. This is so for at least two reasons:

a. As petitioners acknowledge, "the statute in *Wallace* was invalidated . . . *solely* because of its impermissible purpose." Pet. 13 (emphasis added). In other words, the Court based its decision entirely on the first prong of the *Lemon* test, which requires a secular legislative purpose.[14] The other two prongs were not addressed in *Wallace*, and thus are not at issue here.

b. The meaning of the first prong is likewise not an issue here. *Wallace* was emphatic that statutes with *dual* legislative purposes – part secular and part religious – would *pass* the first prong.[15] 472 U.S. at 56. By permitting dual motives, *Wallace* echoed *Lynch v. Donnelly*, 465 U.S.

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[14] The three prongs of the *Lemon* test are:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.

Lemon v. Kurtzman, 403 U.S. at 612, 613 (1971) (quotation marks and citations omitted). Petitioners' earlier claims under the second and third prongs are implicitly abandoned.

[15] While the Commonwealth does not wish to lose sight of the applicable standard, it nevertheless must emphasize that the purposes of the Act are *wholly* secular. Thus, the standard described in *Wallace* allows far more latitude than the Commonwealth needs in order to prevail. This also makes the case inappropriate for certiorari.

668 (1984), which said: "The Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Id.* at 680 (emphasis added). "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Id.* at 681, n.6.[16] The Fourth Circuit expressly relied on *Wallace* and *Lynch* for its understanding of the first prong. Fourth Cir. Op., Pet. 14a-15a.

Petitioners' arguments about dual motives have been a moving target. Despite *Wallace* and *Lynch*, they told the district court that "the legislative purpose must be *wholly secular* in order for the statute to pass the first prong" of *Lemon*. *See* Dist. Ct. Op., Pet. 63a (emphasis added). In the court of appeals, petitioners retreated from this extreme position. They failed to articulate any alternative standard, but refused to accept the standard found in *Wallace* and *Lynch*. Now, by framing their single "question presented" in terms that rely solely on *Wallace*, petitioners are bound by *Wallace's* favorable treatment of dual motives. They cannot properly use this case as a vehicle for challenging that standard. Rule 14.1(a) ("Only questions set out in the petition, or fairly included therein, will be considered by the Court.")

In order to show that the decision below conflicts with *Wallace*, they must show that the Virginia law – like the Alabama law – has *no* secular purpose. It is doubtful whether such a highly fact-specific inquiry would be worthy of certiorari in *any* case. Given the record of *this* case, the task is wholly futile.

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[16] Some laws or practices having dual purposes may also have impermissible *effects* so as to violate the second prong, but they do not run afoul of the first.

3. The Virginia Law Has Secular Purposes.

The Commonwealth has already reviewed the rich array of facts that establish the secular purposes of the Act. *See supra* at 3-11. The court of appeals did so as well. *See* Fourth Cir. Op., Pet. 5a-10a, 14a-17a, 20a-24a. Here the Commonwealth will address those five points emphasized by petitioners in their effort to distract attention from those secular purposes.

a. Petitioners incorrectly assert the text of the statute fails to articulate any secular motive. Pet. 9. They fail to refute the two secular motives found in the text by the court of appeals: (1) permitting *nonreligious* meditation, and (2) *accommodating* religion. "Even though religion is thus the object of one of the statute's purposes, the accommodation of religion is itself a secular purpose in that it fosters the liberties secured by the Constitution." Fourth Cir. Op., Pet. 16a.

Petitioners contend that the right of students to pray silently in the schools "required no accommodation because it was never restricted." Pet. 8. This assertion does not square with the record, which shows a tendency toward discrimination against religious expression in the public schools. *See supra* at 5-7. Many of our nation's laws are intended to implement constitutional guarantees. *See, e.g., Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226, 239 (1990) (upholding Equal Access Act, despite pre-existing First Amendment guarantees, and noting that Congress "perceived widespread discrimination against religious speech in the public schools.") Besides, discrimination is not the only concern. The beginning of the school day is an especially important time for those who wish to engage in mental or spiritual preparation before launching into their studies. It is hard for students to focus their thoughts if they are subjected to distractions by fellow students or the morning announcements. The Act helps students avoid these problems. In any event, this Court has already spoken favorably about statutes that "merely protect[ ] every student's

right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Wallace*, 472 U.S. at 59. Thus, *Wallace* supports the Commonwealth, not petitioners.

Petitioners also fault the Act because its text does not mention other secular purposes on which the Commonwealth relies. Pet. 9, n.3. But there is no rule requiring all purposes of a law to be placed in the text in order to be counted. On the contrary, *Edwards* requires a court to cast a wider net by also looking at legislative history and administrative interpretation. 482 U.S. at 594. In *Wallace*, this Court looked beyond the four corners of the Alabama statute in order to find its purposes, and petitioners repeatedly ask the Court to do the same here. They apparently want a *double standard* that will allow courts to look beyond the text for *religious* motives, but not for *secular* ones. Such a skewed approach is unwarranted.

b. Petitioners say the Act must have a religious motive because the same session of the General Assembly adopted a resolution, HJR 71, favoring a constitutional amendment to allow voluntary school prayer, and thus reverse *Engel v. Vitale*, 370 U.S. 421 (1962). Pet. 9. Yet, they fail to explain how support for a constitutional amendment – a perfectly legitimate exercise – can be equated with unlawfully flouting this Court's jurisprudence. Moreover, there is nothing to connect the Act with HJR 71 other than coincidence of timing: both the resolution and the amendment were passed the same year. The memorandum explaining the Act to local school divisions makes no mention of HJR 71, nor has Virginia otherwise undertaken any campaign to link the two measures. Finally, if there were a correlation of *motives* between the two measures, one would expect to find a correlation of *votes*. Petitioners fail to show any such correlation. Instead, the record shows that the Senate amended the Act by a vote of 28 to 11, while it approved HJR 71 by a vote of 39 to 0. J.A. 441-42. In other words, regardless of how they voted on amending the Act, *every* Senator present voted for HJR 71. There is no correlation.

c. Petitioners again misstate the nature of the floor amendment rejected by the General Assembly. Pet. 10. There was never any attempt to delete just the word "prayer." *See supra* at 8. But, even if such a change had been proposed, there would have been nothing improper about rejecting it. As the chief sponsor of SB 209 explained: "The word prayer in there was put in there so prayer would not be discriminated against." Fourth Cir. Op., Pet. 8a. Moreover, the word has been in the Act since it was originally enacted in 1976, and the 2000 amendment left it untouched.[17] Deleting the word would make it appear that prayer is no longer a permitted activity. "Legislative amendments are presumed as intended to effect or change in the law. . . . We will not read into the statute language which the legislature purposefully deleted." *Shaw v. Commonwealth*, 9 Va. App. 331, 334, 387 S.E.2d 792, 794 (1990).

Petitioners' objection to the word "prayer" is also at odds with *Wallace*. Not a single Justice suggested that use of this word was sufficient to strike down the Alabama law. If it had been that simple, the Court would not have spent so much time looking beyond the text of the statute for evidence of legislative purpose. *See Wallace*, 472 U.S. at 77. Moreover, Justices Powell and O'Connor both voted to invalidate the law, but wrote separate opinions making it plain they did *not* regard the word "prayer" as fatal. Justice Powell emphasized that "Alabama's purpose was *solely* religious," but that he "would vote to uphold the Alabama statute if it *also* had a clear secular purpose." *Id.* at 65-66 (Powell, J. concurring) (emphasis added). The clear implication is that no change in the text was required, only a legitimate purpose. Justice O'Connor observed that "[a] moment of silence law that is clearly

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[17] Petitioners have not alleged that there was any improper motive in writing this language into the Act when it was originally adopted in 1976, nor does the record contain evidence of any improper motive. These omissions greatly complicate petitioners' case and, again, make it unworthy of certiorari.

drafted and implemented so as to permit *prayer*, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should *pass* this test [of constitutionality]." *Wallace*, 472 U.S. at 64 (O'Connor, J., concurring) (emphasis added). These two Justices, combined with the three dissenters who voted to uphold the Alabama statute, constituted a majority for the proposition that the word "prayer" is not fatal to a minute of silence statute. "Indeed, to require a ban on the use of religiously related terms would manifest a hostility to religion that is plainly inconsistent with the religious liberties secured by the Constitution." Fourth Cir. Op., Pet. 25a.

d. Petitioners object to the 2000 amendment because it replaces local discretion with decision-making at the state level. Pet. 11. This preference for "home rule" is not a concern of the Establishment Clause. Moreover, petitioners fail to tell the Court that the General Assembly has sweeping authority to provide direction to local school divisions, and has often exercised that authority.[18] There is nothing sinister about the exercise of that same authority here. Moreover, as the court of appeals noted,

> [there is] no material distinction between the 1976 version of [the Act], in which a political subdivision was authorized to impose a minute of silence and the current statute where the State itself imposed the minute of silence. Both are

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[18] *See, e.g.*, Va. Code § 22.1-200 (mandating teaching of specific subjects); § 22.1-201 (requiring all schools to teach various specific documents of Virginia and United States history); § 22.1-202 (mandating teaching history and principles of United States and Commonwealth flags, including pledge of allegiance and flag etiquette); § 22.1-207.1 (prescribing curriculum guidelines regarding abstinence, human sexuality and reproduction and sexually transmitted diseases); § 22.1-208.01 (requiring character education programs to foster civic virtues) and § 22.1-253.13:1 – 253.13:8 (mandating comprehensive standards of quality for local school divisions).

> mandatory minutes of silence for the students implicated, but neither is coercive in that the affected students are left to choose how they will use the minute of silence.

Fourth Cir. Op., Pet. 24a.

e. Finally, petitioners again misstate the Governor's remarks. Pet. 11-12. They quote him out of context, and fail to note that the Governor viewed the overarching purpose of the Act to be "restor[ing] calm and civility", a goal that is plainly secular. *See supra* at 10.

In sum, petitioners utterly fail to show that "the statute ha[s] *no* secular purpose." *Wallace*, 472 U.S. at 56. Thus, the decision below does not conflict with *Wallace*. There is no basis for granting certiorari.

II. THERE IS NO CONFLICT BETWEEN THE RESULTS IN ALABAMA AND VIRGINIA.

Unable to produce a conflict among the circuits, petitioners allege another sort of conflict: the Alabama law was struck down, yet the Virginia statute stands. Pet. 17-20. This is not a conflict. Petitioners are comparing apples and oranges. The differences in legislative purpose have been discussed. *See supra* at 14-17. The statutory texts are also different.[19] For example, Alabama prohibited all activities *other than* meditation and prayer. By contrast, Virginia allows *any* silent, seated activity that

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[19] The Alabama statute said:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for *meditation or voluntary prayer*, and during any such period *no other activities* shall be engaged in.

Wallace, 472 U.S. at 40, quoting Ala. Code § 16-1-20.1 (emphasis added).

does not distract others. Students here have much greater freedom to use the minute of silence as they choose.[20]

Unlike Alabama, Virginia expressly – and repeatedly – disclaims any intent to advance or inhibit religion. The Act says students must be subject to "the least possible pressure . . . either to engage in, or to refrain from, religious observation on school grounds." Va. Code § 22.1-203. It also says – twice – that students must "exercise . . . individual choice" in deciding how to use their minute of silence. *Id.* These disclaimers are key. "[I]f the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment). In keeping with its avowed religious intent, Alabama made no such disclaimer, and forfeited such deference.

Even if Alabama and Virginia used the same texts, it would not compel the same results. It was not the *text* of

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[20] Petitioners complain that the Act does not allow children to "opt out of the state sponsored activity." Pet. 17, n.6. Since a minute of silence is not a religious exercise, it is difficult to see on what basis a student might want to "opt-out." Even so, the statute governs what goes on inside the classroom, not what happens elsewhere in the school. Thus, contrary to petitioners' assessment, the Act does not prevent a school from excusing students from the classroom if such a request were made.

Petitioners also call Virginia's law "more onerous" than the one invalidated in *Wallace*. They note that Alabama said teachers "may" announce a minute of silence, while Virginia says they "shall" do so. Pet. 18, n.7. But the distinction between "may" and "shall" played no part in *Wallace*. 472 U.S. at 59. Indeed, the Alabama statute that survived – the original, 1978 law – used "shall". *Wallace, Id.* at 40, quoting Alabama Code § 16-1-20 (Supp. 1984) ("teacher . . . shall announce . . . a period of silence."). It is not important what *level* of government makes the decision to have a minute of silence. What is important is that Virginia provides students broad freedom to use this time as they choose.

the Alabama law that doomed it, but its legislative history and Alabama's use of the law to assault the Establishment Clause. The Virginia legislative history is markedly different, and Virginia has carefully implemented its law to comply with the Establishment Clause. *See supra* at 4, 5, 10 and 11. Thus, the difference of outcome creates no "constitutional anomaly."

Petitioners nevertheless try to shore up their "anomaly" theory with cases they say struck down minute of silence laws by "interpreting *Wallace*". Pet. 18-19. They are mistaken. The cases they cite were decided *before Wallace* and/or are otherwise distinguishable.

a. Petitioners cite *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985), striking down West Virginia's constitutional requirement for a minute of silence. The district court in *Walter* lies within the Fourth Circuit. Thus, to the extent it may conflict with the decision below, *Walter* is no longer good law. Moreover, *Walter* was decided in March of 1985; *Wallace* was not decided until three months later. Thus, *Walter* did not "interpret" *Wallace*.

b. In a similar mistake about dates, petitioners cite *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982), *vacated and appeal dismissed*, 718 F.2d 1098 (6th Cir. 1983), where the district court struck down Tennessee's "Silent Prayer Act." While the case was on appeal, the law was repealed and replaced by a new "Silent Minute Act." Thus, the district court's decision was vacated as moot. 718 F.2d at 1098. All of this happened years before the decision in *Wallace*.

c. Petitioners also cite *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985), *appeal dismissed sub. nom., Karcher v. May*, 484 U.S. 72 (1987), a case easily distinguishable on the facts. Deciding the case before *Wallace*, the district court struck down New Jersey's statute. Deciding the appeal a few months after *Wallace*, a divided panel of the Third Circuit felt bound by the district court's finding that the law lacked pedagogical value, and struck it down

under the secular purpose prong.[21] Such a result cannot be reached here. Petitioners have never alleged a lack of pedagogical value. In fact, they have *acknowledged* it. *See supra* at 4. Moreover, Virginia has affirmatively demonstrated pedagogical value by unrebutted expert testimony and the experience of localities that implemented a minute of silence before the 2000 amendment. *See supra* at 4, 5. Instead of helping petitioners, *May* illustrates how the presence or absence of a secular purpose depends on the particular facts of a case. The Fourth Circuit did a good job of reviewing the facts here. There is no need for this Court to repeat the task.

More pertinent than *May* are the two circuit courts that relied on principles from *Wallace* to uphold minutes of silence: *Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998), and *Bown v. Gwinett Co. Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997). In trying to discount these cases, petitioners misstate them.

In *Chaudhuri*, the Sixth Circuit decided two issues: (1) In a split decision, the panel ruled that vocal prayer at a state university function does not violate the Establishment Clause. (2) In a unanimous decision, the panel also ruled that a moment of silence at the university is constitutional under *Wallace*. Petitioners argue that the Sixth Circuit upheld the moment of silence because of the distinction between adults and children. Pet. 19. They misread the case. The court discussed the adult-child distinction in connection with vocal prayer, not the minute of silence. *See* 130 F.3d at 238-39. Moreover, the adult-child distinction was discussed in connection with the *effects* of vocal prayer. Effects are addressed under the

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[21] The dissent in *May* persuasively notes that the relevant inquiry is not whether a court believes a minute of silence actually serves a particular purpose, but whether "the statute seems so patently ineffective or irrelevant with respect to the alleged secular purpose that it is unreasonable to believe that the legislature enacted the statute to serve that purpose." *May*, 780 F.2d at 265 (Becker, J., dissenting).

second prong of *Lemon*, which is not at issue here. *See supra* at 17. Petitioners' readiness to gloss over these facts again shows why certiorari is inappropriate.

In *Bown*, the Eleventh Circuit decided that Georgia's minute of silence statute is constitutional. Petitioners contend that Georgia "removed references to prayer" contained in a previous version of the challenged statute. Pet. 19-20. But, that is not exactly so. As amended, the statute expressly permitted "student initiated voluntary school prayers". 112 F.3d at 1466, *quoting* Ga. Code Ann. § 20-2-1050(c). While another reference to "prayer" was removed, the case did not turn on that fact. Indeed, the Eleventh Circuit relegated the change to a footnote. 112 F.3d at 1470, n.3. What is most significant about *Bown* is that the court-approved guidelines for implementing the Georgia law are the model for the implementation guidelines used in Virginia. *Compare Bown*, 112 F.3d at 1468, *with* Fourth Circuit Op., Pet. 9a. Those guidelines underscore the secular purposes of the Act.

In sum, conflicts among the circuits often furnish cases worthy of certiorari, but there is no such conflict here. Petitioners' failed attempt to manufacture some other conflict – based on different laws with different purposes – highlights the weakness of their petition. Certiorari should be denied.

III. CERTIORARI IS NOT NEEDED TO RESOLVE QUESTIONS ABOUT DISCERNING LEGISLATIVE INTENT.

In their third argument, petitioners step outside of their "question presented" and ask this Court to adopt a new standard for dual purpose statutes, a standard at odds with the one followed in *Wallace*. The evidence shows that the Commonwealth's purposes were *exclusively* secular; however, the Court need not reach that conclusion in order to see that certiorari is inappropriate.

Petitioners apparently advocate some sort of balancing test, weighing the amount of religious motivation

against the amount of secular motivation to see if the secular motives are more than "incidental." Pet. 23. Such an approach to *Lemon's* secular purpose prong is contrary to the approach followed in *Wallace*, where the Court struck down the Alabama statute because it had *"no* secular purpose." 472 U.S. at 56 (emphasis added). There is no reason to revisit this standard. But even if the Court wished to reconsider its treatment of dual motives, there are at least three reasons why this case would be a poor vehicle for doing so.

a. In their "question presented," petitioners ask for *Wallace* principles to be applied, not modified. When an issue is not included in the question presented, it is disqualified from consideration. Rule 14.1(a).

b. Petitioners cite several cases they believe suggest a less rigorous approach to dual purpose statutes than the one used in *Wallace* and *Lynch*. But, in each of those cases, the challenged practice involved *inherently religious content*. *See, e.g., Santa Fe Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (vocal prayers over loud speakers); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching creationism); *Stone v. Graham*, 449 U.S. 39 (1980) (posting Ten Commandments in classroom); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (daily Bible reading in classroom). The distinction between these religious content cases and a minute of silence is fundamental:

> A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading . . . [because] a moment of silence is *not inherently religious*. . . . [Thus] a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading.

Wallace, 472 U.S. at 72 (O'Connor, J., concurring in judgment) (emphasis added).[22] Thus, if the Court wished to consider a different approach to dual motives in cases involving inherently religious content, a minute of silence case would not be a useful occasion for doing so.

c. Even if petitioners' new approach were applied here, it would not alter the outcome. The evidence of secular purposes is too compelling. In an effort to minimize that evidence, petitioners claim the Fourth Circuit "improperly emphasized" the "absence of official statements" showing a religious purpose. Pet. 23. But, their argument is belied by the broad array of evidence addressed by the Fourth Circuit's opinion. *See* Fourth Cir. Op., Pet. 5a-10a, 14a-17a, 20a-24a. Moreover, the facts that petitioners say are over-emphasized are key points in distinguishing this case from *Wallace*. Since petitioners argue that *Wallace* governs, they should not complain when the court points out why it does not.

Finally, this Court has already provided ample guidance on how to assess legislative purpose. Much of that

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[22] Petitioners' search for the seeds of a new standard is further frustrated by this Court's treatment of cases on which they rely. For example, both *Stone* and *Schempp* were decided before the 1984 decision in *Lynch*. Both are cited by *Lynch* as examples of governmental action that was invalidated "only" because "there was no question that the statute or activity was motivated *wholly* by religious considerations." 465 U.S. at 680 (emphasis added).

Judge O'Connor's concurring opinion in *Lynch* takes a somewhat different tack in its treatment of *Stone* and *Schempp*, and in its warning against reliance on secular purposes that are *de minimus*. 465 U.S. at 690-91 (O'Connor, J., concurring) (first prong is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes."). Yet, this cautionary note would not help petitioners here, where the secular purposes are obviously substantial and where, unlike *Stone* and *Schempp*, the challenged activity is devoid of inherently religious content.

guidance is collected in Justice O'Connor's opinion in *Wallace*, where she said "the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited." *Wallace*, 472 U.S. 74, *citing Everson v. Board of Education*, 330 U.S. 1, 6 (1947). She also noted that "[a] court has no license to psychoanalyze the legislators." *Id.*, *citing McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (opinion of Frankfurter, J.). Moreover, "[i]f a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history, or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence, then courts should generally defer to that stated intent." *Id.* at 74-75, *citing Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971).

The court of appeals followed this guidance when it held that the Act is constitutional and that "*Wallace* is clearly distinguishable." Pet. 24a. By disregarding existing guidance – and seeking new standards instead – petitioners reveal the great distance they must go in order to prevail. Their case does not merit certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

ED BROWN, *et al.*,
Petitioners,

v.

JAMES GILMORE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTRODUCTION

We are reminded in these difficult times of the Framers' justifiable fear of mixing religious fervor and civil authority. Religion and government combine with unique power and coercive effect. It is for this reason that the First Amendment erects a wall of separation between church and state, which for over two centuries has served to protect religious freedom by committing matters of prayer and religion to the private sphere and individual choice.

Importantly, Petitioners do *not* dispute that there is nothing to fear from a classroom of otherwise silent and thoughtful children, who may wish to reflect upon the events of September 11 or silently pray upon their own initiative. Brief in Opposition to Petition for Writ of Certiorari ("Opp.") at 1.[1] However, there is everything to fear when civil authority oversteps the bounds of governmental neutrality and *mandates* observance of a minute of silence in every public school classroom that, because of the legislative and political grandstanding that accompanies the statute, "may appear to the [children] to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). In *Wallace v. Jaffree*, 472 U.S. 38 (1985), a clear majority of this Court invalidated a statute very similar to the Virginia law at issue here. It did so because, as with Virginia, the Alabama legislature overstepped the bounds of government neutrality in a similar (albeit more brazen) fashion. This petition presents the same circumstances raised in that seminal case, and the First Amendment's Establishment Clause, as interpreted in *Wallace v. Jaffree*, requires invalidation of Virginia Code § 22.1-203.

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[1] Where possible, this brief will cite to the appendix attached to the Petition for a Writ of Certiorari (*e.g.*, Pet. App. 73a-74a). Where necessary, Petitioners will cite the joint appendix used in the court of appeals (*e.g.*, JA-298).

SUMMARY

In their Opposition, Respondents (collectively, the "Commonwealth") pursue a number of different and sometimes conflicting tactics.[2] Some are aimed at muddling the factual record, some are targeted at rewriting the appropriate legal standards, but all are designed to distract the Court's attention away from the real issues of this case and to convince this Court "to pretend that [it] do[es] not recognize what every . . . student understands clearly—that this [statute] is about prayer." *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 315 (2000). This Court should "refuse to turn a blind eye to the context in which this [statute] arose, and that context quells any doubt that this [statute] was implemented with the purpose of endorsing school prayer." *Id.*, 530 U.S. at 315.

I. THE COMMONWEALTH'S FACTUAL MISDIRECTION

In its Statement of the Case, the Commonwealth erects a series of strawmen—through irrelevant, inadmissible, and/or plainly incorrect factual assertions—in order to clutter the landscape of this litigation and distract the Court from the record of impermissible legislative purpose that requires invalidation of Virginia's minute of silence law. In particular, the Commonwealth refers the Court to various putative "expert" opinions on religion and schools from individuals who had nothing to do with the passage of the minute of

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[2] For example, the Commonwealth and, indeed, the bill's sponsor have contended at various points that the Virginia minute of silence law is not concerned with religion or prayer. *See* Opp. at 7 (quoting Sen. Barry) ("[T]he purpose of the Bill . . . is not a religious crusade . . . [or to] reinject prayer. . ."). Yet, repeatedly throughout its Opposition, the Commonwealth argues that the statute is *necessary* to combat discrimination against prayer and to accommodate prayer. *See, e.g., id.* at 21. In fact, the preamble to the statute expressly states that its purpose to guarantee the "free exercise of religion." Pet. App. 72a.

silence statute (Opp. at 4-7), unrelated pieces of state legislation and federal legislative proceedings (*id.* at 5-6), and excerpts from unrelated Presidential remarks delivered at a speech some five years before the challenged statute was introduced. *Id.* at 6. Similarly, the Commonwealth devotes roughly half of its Statement of the Case to "facts" regarding the *implementation* of either the 1976 version or 2000 version of Va. Code § 22.1-203. *Id.* at 3-5, 10-11.

This case, however, concerns *only the 2000 version* of the minute of silence law and only that statute's *facial validity*. As this Court has recognized, expert testimony of the sort proffered by the Commonwealth lacks probative value in a facial challenge suit under the Establishment Clause, where the principal inquiries revolve around the text of the statute, its contemporaneous legislative history, and, ultimately, the legislature's purpose in enacting it. "[T]he postenactment testimony of outside experts is of little use in determining the Legislature's purpose in enacting the statute," particularly where, as here, "none of the persons making the affidavits . . . participated in or contributed to the enactment of the law." *Edwards v. Aguillard*, 482 U.S. 578, 595-96 (1987). The same applies to the Commonwealth's discussion of Virginia's "guidelines on constitutional rights and restrictions relating to prayer and other religious expression in the public schools," the U.S. Congress' consideration of the Equal Access Act, and remarks by former President Bill Clinton. These "facts" bear no relationship to the Commonwealth's enactment of the minute of silence statute.[3]

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[3] Petitioners properly raised their objections to this proffered evidence in both the district court and the court of appeals and preserve those objections here. *See* Fed. R. Civ. P. 56(e). Petitioners also note that the Commonwealth's objections regarding the admission of newspaper articles evidencing legislative intent are misplaced. *See* Opp. at 8-9 n.7. These accounts describe public statements of public officials and are intended by the speakers to be disseminated widely to their

Once these entirely irrelevant, inadmissible, and/or incorrect assertions are dispatched with, what is left is a plain and compelling set of facts, as set forth in the Petition for a Writ of Certiorari, which requires invalidation of the law at issue.

II. THE COMMONWEALTH'S LEGAL MISDIRECTION

The Commonwealth argues that this Petition should not be granted to resolve the apparent conflict between the court of appeals' decision here and this Court's decision in *Wallace v. Jaffree*, 472 U.S. 38 (1985), principally because, in the Commonwealth's view: (1) *Wallace* is too "fact-specific" to be of any precedential value whatsoever; (2) the Virginia minute of silence statute, which expressly provides for prayer and was accompanied by an official, communicated legislative endorsement of school prayer, is "different" than the Alabama statute invalidated in *Wallace*, which expressly provided for prayer and was accompanied by an official, communicated legislative endorsement of school prayer; and (3) the standards governing judicial inquiry into legislative purpose in Establishment Clause cases and the *Wallace* decision itself should be rewritten, in part by cobbling together selected portions of dissenting and concurring opinions, to stand for the proposition that a statute expressly providing for prayer must be constitutional—no matter how steeped in religious purpose—so long as it is accompanied by the smallest scintilla of concurrent secular objectives. The Commonwealth's efforts to avoid this Court's review cannot

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constituents. Importantly, the Commonwealth has never questioned the veracity of these accounts and they were cited extensively by the court of appeals. Similarly, in another moment of silence case, the Third Circuit concluded that the district court did not err in considering newspaper articles that discussed the state legislators' intent in passing the statute. *May v. Cooperman*, 780 F.2d 240, 252 n.9 (3d Cir. 1985).

withstand scrutiny and, indeed, only emphasize the appropriateness of granting the Petition.

A. This Court's Controlling Precedent Set Forth in *Wallace v. Jaffree* is Not So Limited as the Commonwealth Suggests.

The Commonwealth argues that this Court's decision in *Wallace v. Jaffree* is nothing more than a fact-specific "test case" of little precedential value, because Alabama enacted its minute of silence in open defiance of this Court's decision regarding public school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962). In this case, the Virginia General Assembly enacted its minute of silence simultaneously with a joint resolution that expressly criticized this Court's decision in *Engel v. Vitale*, and openly called for a return of prayer to the public school classroom. Pet. App. 73a-74a.[4] However, the Commonwealth argues that these two circumstances are sufficiently distinct to require a difference in constitutional result, in large part because Virginia chose a "perfectly legitimate exercise" for returning prayer to the public schools (*i.e.*, passing a resolution seeking a constitutional amendment), while Alabama "unlawfully flout[ed] this Court's jurisprudence." Opp. at 20.

This argument is not only factually flawed, but entirely misses the point. The issue under *Wallace* is not whether the *methods* employed by Virginia or Alabama to achieve an unconstitutional result are themselves legitimate. Rather, it is whether the communicated *purpose* of the legislature is constitutionally impermissible. Thus, regardless of precisely *how* Alabama conveyed the message to its public school

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[4] The Commonwealth disingenuously claims that simultaneous passage of the minute of silence statute and the joint resolution is nothing more than a "coincidence of timing" and that both were merely passed in the "same year." Opp. at 20. The Virginia Senate, in fact, approved the two measures on the *very same day*.

students that its minute of silence statute carried with it a state endorsement of prayer, the statute was invalidated because that intent did exist and it was communicated to the students. Although Virginia undertook a somewhat less brazen approach in implementing its desire to return prayer to the public school classroom, that purpose nevertheless existed and was conveyed to Virginia's public school children.

Perhaps recognizing the inevitable application of *Wallace* to the case at hand, the Commonwealth argues that the Virginia minute of silence statute is nevertheless constitutional because, unlike its Alabama counterpart, it is animated by three "secular" purposes: (1) guaranteeing students' religious liberty (*i.e.*, students' right to pray) in public schools; (2) advancing pedagogical goals, such as good order and discipline and introspection; and (3) extending the benefits of a minute of silence (*i.e.*, mandating its observance) statewide while providing a defense to any lawsuit challenging it. Opp. at 2. *See also id.* at 19-23. Of course, only the first and third of these stated purposes may be gleaned from the text of the statute, which makes no mention whatsoever of any pedagogical goals.[5] But, whatever the

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[5] Moreover, the first proffered purpose, while expressly set forth in the text of the statute, is entirely transparent. The Commonwealth contends that the minute of silence statute is somehow necessary to protect against an unidentified religious discrimination and boldly asserts that "the record . . . shows a tendency toward discrimination against religious expression in the public schools." Opp. at 19. *See also id.* at 15. However, the "record" evidence to which the Commonwealth refers consists *entirely* of the various *post-hoc* "expert" affidavits, unrelated Presidential remarks, and unrelated legislative proceedings discussed above, all of which have been properly objected to and all of which are entirely irrelevant, much less demonstrative of any threat of religious discrimination. Furthermore, the Commonwealth has admitted—and, indeed, trumpeted—that, even in the context of prior minute of silence exercises in the Virginia public schools, there has been no evidence of "peer on peer harassment or other problems," and that the minute of silence "worked well and has not caused anyone a problem." Opp. at 4.

stated purpose of this statute (or, for that matter, whatever inconsequential differences in wording or context might exist between the Virginia statute and the Alabama statute), what makes this case constitutionally indistinguishable from *Wallace* is the presence of a statute that expressly provides for prayer accompanied by legislative grandstanding that undeniably conveys a message of endorsement of public school prayer. The communicated message that the state endorses group prayer in the public schools—as manifested in the minute of silence statute—is the concern of the First Amendment and was the concern of this Court in *Wallace*.

The Commonwealth then posits that this Court, in *Wallace*, "made it plain that a statute with a dual legislative purpose – part secular and part religious—***would*** pass the [purpose] prong [of the *Lemon* test]." Opp. at 13 (emphasis added). Accordingly, the Commonwealth self-servingly concludes that state action must be deemed constitutional unless it has *no* secular purpose (*id.* at 18)—regardless of how predominant any religious motives might have been—even though the Commonwealth has admitted that such a standard would render the first prong of *Lemon* an "all-but-impossible" hurdle for citizens seeking to validate their First Amendment rights. JA-298. Indeed, under the Commonwealth's approach, a statute that is 99% motivated by a religious intent, clearly communicated to the citizenry, ***must*** be upheld if some of the supporters perceived secular benefits that might flow from it as well.

Of course, neither *Wallace* nor any other decision of this Court has set forth such an unworkable position. To the

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But, even if some such threat did exist, the Commonwealth has conceded that the First Amendment already protects students' free exercise of religion in such circumstances, thereby obviating the need for the challenged statute to do so. *See* JA-301 ("If local school officials were to discriminate against silent prayer, it would violate First Amendment rights.").

contrary, *Wallace* unambiguously stated that "a statute that is motivated in part by a religious purpose ***may*** satisfy the first criterion [of the *Lemon* test]." *Wallace*, 472 U.S. at 56. *Wallace* did not hold, as the Commonwealth would have it, that such a statute "***would*** satisfy" or "***does*** satisfy" or even "***likely*** satisfies" the purpose test. Rather, the *Wallace* decision recognizes that a statute with mixed legislative motives may or may not satisfy the First Amendment, depending upon the circumstances of the case. The statute in question must be motivated by a secular purpose and "[t]hat requirement is not satisfied . . . by the mere existence of ***some*** secular purpose, however dominated by religious purposes." *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring) (emphasis added). *See also* Petition for a Writ of Certiorari at 23-24 (citing *Edwards*, 482 U.S. at 594; *Stone v. Graham*, 449 U.S. 39, 41 (1980); *School Dist. of Abington Township v.* Schempp, 374 U.S. 203, 224 (1963)).[6] Thus, even if the General Assembly was able to perceive some secular pedagogical advantages in the minute of silence exercise, the Virginia minute of silence statute was so dominated by religious purposes that it cannot pass constitutional muster. No effort by the Commonwealth to rewrite the governing legal standards can alter this result.[7]

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[6] The Commonwealth essentially concedes that the cases cited in the petition command a "less rigorous approach to dual purpose statutes" than what the Commonwealth now suggests is the governing standard. Opp. at 28. However, the Commonwealth urges that this approach should be confined to cases in which the challenged activity is not "inherently religious." *Id.* at 28-29. Even if the Court were to adopt this novel approach, there can be no doubt that the challenged activity here—a mandatory exercise encouraging silent student prayer—is an inherently religious activity.

[7] Petitioners have never, as the Commonwealth alleges, argued that the appropriate standard under the first *Lemon* prong is that the legislative purpose must be "wholly secular," nor has Petitioner's position on this issue ever been a "moving target." Opp. at 18. To the contrary, at every

Likewise, the Commonwealth engages in a baffling rewriting exercise, in which it attempts to piece together various dissenting and concurring opinions from *Wallace* in order to rewrite the plain ruling of the majority opinion. Opp. at 21-22. In particular, the Commonwealth argues that, when *Wallace* is viewed through the Commonwealth's own mysterious calculus, it is actually a 5-4 majority decision holding that a state's intentional and express endorsement of prayer within the text of a minute of silence statute is not constitutionally fatal (*id.*), even though the *Wallace* majority (by a 6-3 vote) unambiguously stated that, by including the word "pray" in a minute of silence statute, "the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Wallace*, 472 U.S. at 60. The Commonwealth may not rewrite the controlling decisions of this Court in order to remove constitutional obstacles to its own agenda.

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level of this litigation, Petitioners repeatedly and consistently have taken the same position—as set forth above—regarding the appropriate standards to be applied under the purpose prong of the *Lemon* test. The district court inexplicably misread or mistook Petitioners' position on the appropriate standard to apply (Pet. App. 63a), and now the Commonwealth appears bent on perpetuating that misstatement of Petitioners' position. Even a cursory review of *any* brief filed at *any* level in these proceedings by Petitioners reveals the Commonwealth's charge to be a knowing distortion of the record. *See, e.g.*, JA-446 (Petitioners stating to district court that, under *Wallace*, "a statute that is motivated in part by a religious purpose ***may*** satisfy the first criterion [of the *Lemon* test]."). Indeed, Petitioners addressed this very same misstatement in their submissions to the court of appeals. *See* Opening Brief of Appellants at 24 n.7.

B. The Commonwealth's Opposition Highlights the Need for the Court to Provide Guidance Regarding the Application of the "Religious Purpose" Prong.

As the foregoing discussion illustrates, there are significant questions regarding precisely how much non-secular purpose is enough to invalidate a statute and how, and why, the communicated purpose underlying the statute should be weighed in determining whether an otherwise permissible exercise of legislative power must be held inconsistent with the Establishment Clause. The Court should grant the Petition to provide guidance in this regard.

Moreover, the Commonwealth's brief further emphasizes the need for the Court to address the methodology for ascertaining precisely what the purpose or purposes underlying a statute are. For example, the Commonwealth asserts three proffered "secular" purposes in defense of the statute, the second of which is nowhere found in the text of the statute. Opp. at 2. And while Petitioners agree with the Commonwealth's assertion that "there is no rule requiring all purposes of the law to be placed in the text in order to be counted" (Opp. at 20), the question remains as to where those purposes should appear and/or where a reviewing court should look for them, as well as what weight should be given to the various (and sometimes competing) sources of legislative intent. Accordingly, this Court should grant the Petition in order to provide guidance as to the appropriate method for determining legislative intent for Establishment Clause cases.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This supplemental brief is filed by the Attorney General of Virginia on behalf of all respondents (collectively, "the Commonwealth") in response to new matters appearing in the reply brief of petitioners.

ARGUMENT

a. In a new argument, petitioners misquote *Edwards v. Aguillard*, 482 U.S. 578 (1987). In *Edwards*, the Court discounted the post-enactment testimony of certain experts and, in so doing, stressed that "none of the persons making the affidavits produced by [Louisiana] participated in or contributed to the enactment of the law *or its implementation*." *Id.* at 595-96 (emphasis added). In quoting this passage, petitioners chop off the last three words. *See* Reply Brief of Petitioners ("Reply Br.") at 3. The omission is significant because much of the expert testimony relating to secular purposes was provided by Dr. Jo Lynn DeMary, the State Superintendent of Public Instruction, whose role in implementing the Act is uncontroverted. *See* Brief in Opposition ("Br. Opp."), Statement of the Case, ¶¶ 3, 5, 7a, 9 and 15.

Petitioners' omission is part of their larger failure to recognize what *Edwards* says about the sources to be examined in discerning legislative purpose. Even in a facial challenge, those sources include "interpretation by a responsible administrative agency." 482 U.S. at 594. Here, the responsible administrative agencies include not only the State Superintendent, but also the State Board of

Education that promulgated the guidelines reflecting the secular purposes of the Act. *See* Br. Opp. at 5. Petitioners' objections to the Commonwealth's evidence are unfounded.

b. Unlike the original petition, the reply brief clearly shows that petitioners are counting on the admissibility of newspaper articles allegedly providing evidence of impermissible legislative purpose. *See* Reply Br. at 3, n.3. (At the same time, petitioners fail to identify what statements in the articles they want the Court to consider.) Thus, while their "question presented" addresses only the application of *Wallace*, this case is likely to involve extraneous issues about the rules of evidence and the scope of relevant "legislative history." *See* Rule 14.1(a).

Petitioners argue that the Court should consider such newspaper articles based on the authority of *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985). But a single circuit court opinion is a very frail reed on which to base certiorari. Moreover, not even *May* says what petitioners want it to say. In *May*, the Third Circuit discussed – but did not rule on – the hearsay objection, saying that the appeal did not turn on that issue, and that the district court's findings would have been the same whether or not the clippings were excluded. *Id.* at 252, n.9.[1]

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[1] Nor can petitioners take comfort in the decision of the *May* district court that allowed the disputed newspaper articles into evidence. The district court did so largely because "[t]he New Jersey legislature does not preserve an official record of its hearings and debates." *May v. Cooperman*, 572 F. Supp. 1561, 1564 (D.N.J. 1985). In Virginia, unlike New Jersey, transcripts of

Petitioners' desire to draw this Court into a long and unavailing evidentiary excursion again shows that this case is very fact-specific and that certiorari is ill-advised.

c. Petitioners also misquote *Wallace* – albeit in an indirect quotation – when they say that "the *Wallace* majority . . . unambiguously stated that, by *including* the word 'pray' in a minute of silence statute, 'the State intended to characterize prayer as a favored practice.' " Reply Br. at 9 (emphasis added), citing *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). The Court never said that "including" the word prayer was a problem. The Court referred instead to the "addition" of that word to a pre-existing legislative scheme that *already* secured the right to pray during an appropriate minute of silence. 472 U.S. at 59. By contrast, before the 2000 amendment, the Virginia Act did not secure that right for the many students who attended schools where a "local option" minute of silence had never been implemented.[2]

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what was actually said on the floor of the legislature are available, and have been introduced into the record. J.A. 123-71, 314-42, 347-55. Contrary to petitioners' suggestion, there is obviously no need for a litigant to inquire into – much less "contest" – the accuracy of matters that are not properly in evidence.

[2] Petitioners try to refute the Commonwealth's concern about discrimination by noting that there were no problems in connection with the minute of silence in those jurisdictions that implemented it under the pre-2000, local option version of the Act. Reply Br. at 6, n.5. Their argument is a *non sequitur*. The pre-2000 version of the Act – like the current version – contained the word "prayer" and, therefore, served notice that such discrimination was not permitted during a minute of silence. Petitioners fail to explain how such notice would be communicated if the word were to be deleted from the statute.

d. Petitioners' discussion of the word "may" in *Wallace* is based on an incomplete – and highly misleading – quotation of the sentence where this word is used. *See* Reply Br. at 7, 8. The *Wallace* sentence in question reads: "For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, *the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.*" *Wallace*, 472 U.S. at 56 (internal citation omitted) (emphasis added). Petitioners chop off the italicized words where the main point of the sentence is made. *See* Reply Br. at 8. By obscuring both the Court's main point and the sentence structure, petitioners do not allow the word "may" to be read in context. For a word like "may" with multiple meanings, context is important. As one authority notes: "*May* . . . can be used in a discussion rather like *although*: to introduce a fact, when one is going to say that the fact makes no difference to the main argument. . . . [I]n this structure, *may* is often used to talk about things that are definitely true, not just possible." MICHAEL SWANN, PRACTICAL ENGLISH USAGE 327 (Oxford University Press 2d ed., 1995) (1980).[3] The sentence in question from *Wallace* uses just such a structure and appears intended to convey just such a meaning. When "may" is read in the context used by the Court, it carries a meaning of definiteness, not mere possibility, a conclusion consistent

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[3] An example given by this authority illustrates the point. Consider the sentence: "It **may** be a comfortable car, but it uses a lot of petrol." This means: "I *agree* that it is comfortable, but . . . " It does not mean: "There's *a chance* that it is comfortable. . . . " SWANN, *supra*, at 327 (emphasis added).

with *Lynch v. Donnelly*, 465 U.S. 668 (1984). *See* Br. Opp. at 17, 18.

Even if "may" is read as petitioners want it read, their argument shows anew why their case is not worthy of certiorari. They say "the *Wallace* decision recognizes that a statute with mixed legislative motives may or may not satisfy the First Amendment, *depending upon the circumstances* of the case." Reply Br. at 8 (emphasis added). By petitioners' reading of *Wallace*, the decision whether a statute passes the first prong of the *Lemon* test depends on the *specific facts* of the case, without any principle of general application. It is doubtful whether such a highly fact-specific inquiry would be appropriate for certiorari in any case. It is certainly not appropriate here in light of the thorough factual analysis undertaken by the court of appeals. *See* Fourth Cir. Op., Pet. 5a-10a, 14a-17a, 20a-24a.

Petitioners ask the Court to measure secular purpose by developing some sort of new, percentage test not found in *Wallace*. *See* Reply Br. at 7. Even if *Wallace* did not foreclose such a test, it certainly would not require it. Indeed, the holding in *Wallace* is cast in absolute terms, saying that a statute fails the first prong when it has "*no* secular purpose." 472 U.S. at 56 (emphasis added). Since petitioners candidly base their case on a new test not found in *Wallace*, the decision of the court of appeals plainly does not violate the holding of that case. Thus, by their own brief, petitioners disprove the central argument of their petition. Moreover, in order to consider the sort of test sought by petitioners, the Court must step outside petitioners' narrow, *Wallace*-based "question presented." As previously noted, this would violate Rule 14.1(a), a

point that petitioners have not addressed – much less refuted. For these reasons, too, certiorari is inappropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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